DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-788
Title: Charles A. Rehberg, Petitioner
v.
James P. Paulk
Docketed: December 15, 2010
Linked with 10A341
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (09-11897)
Decision Date: July 16, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 4 2010	Application (10A341) to extend the time to file a petition for a writ of certiorari from October 14, 2010 to December 13, 2010, submitted to Justice Thomas.
Oct 6 2010	Application (10A341) granted by Justice Thomas extending the time to file until December 13, 2010.
Dec 13 2010	Petition for a writ of certiorari filed. (Response due January 14, 2011)
Jan 4 2011	Waiver of right of respondents Kenneth B. Hodges, III, et al. to respond filed.
Jan 14 2011	Motion for leave to file amicus brief filed by Government Accountability Project.
Jan 24 2011	Order extending time to file response to petition to and including February 14, 2011.
Feb 1 2011	Brief of respondent James P. Paulk in opposition filed.
Feb 16 2011	Reply of petitioner Charles A. Rehberg filed.
Feb 23 2011	DISTRIBUTED for Conference of March 18, 2011.
Mar 21 2011	Motion for leave to file amicus brief filed by Government Accountability Project GRANTED.
Mar 21 2011	Petition GRANTED.
Apr 19 2011	Letter from counsel, indicating that respondents Kenneth B. Hodges, III, and Kelly R. Burke will not be proceeding further in this matter filed.
May 5 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 6, 2011.
Jun 3 2011	The time to file the joint appendix and petitioner's brief on the merits is further extended to and including June 9, 2011.
Jun 9 2011	Joint appendix filed.
Jun 9 2011	Brief of petitioner Charles A. Rehberg filed.
Jun 16 2011	Brief amicus curiae of United States supporting vacatur and remand filed.
Jul 13 2011	The time to file respondents' briefs on the merits is extended to and including August 10, 2011.

Jul 22 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 1 2011	The time to file respondents' brief on the merits is further extended to and including September 9, 2011.
Aug 4 2011	Opposition of petitioner to motion of the Solicitor General filed.
Aug 8 2011	SET FOR ARGUMENT ON Tuesday, November 1, 2011.
Aug 19 2011	CIRCULATED.
Aug 22 2011	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Aug 29 2011	Record received from U.S.DC. for Middle District of Georgia. (1 envelope)
Sep 9 2011	Brief of respondent James P. Paulk filed. (Distributed)
Sep 16 2011	Brief amici curiae of International Municipal Lawyers Association, et al. filed. (Distributed)
Sep 23 2011	Letter from counsel for the respondents in response to the motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument.
Oct 11 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 11 2011	Reply of petitioner Charles A. Rehberg filed. (Distributed)
Nov 1 2011	Argued. For petitioner: Andrew J. Pincus, Washington, D. C. For respondents: John C. Jones, Marietta, Ga.

PETITION
FOR
WRIT OF
CERTIORARI

RECORD
AND
BRIEFS

FILED

10-738 DEC 13 2010

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III,
AND KELLY R. BURKE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street,
Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

In *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), this Court held that law enforcement officials enjoy absolute immunity from civil liability under 42 U.S.C. § 1983 for perjured testimony that they provide at trial. But in *Malley* v. *Briggs*, 475 U.S. 335 (1986), this Court held that law enforcement officials are *not* entitled to absolute immunity when they act as "complaining witnesses" to initiate a criminal prosecution by submitting a legally invalid arrest warrant. The federal courts of appeals have since divided about how *Briscoe* and *Malley* apply when government officials act as "complaining witnesses" by testifying before a grand jury or at another judicial proceeding. The question presented in this case is:

Whether a government official who acts as a "complaining witness" by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a Section 1983 claim for civil damages.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles A. Rehberg respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-44a) issued on rehearing is reported at 611 F.3d 828. The panel's initial, withdrawn opinion (App., *infra*, 45a-80a), is reported at 598 F.3d 1268. The opinion of the District Court for the Middle District of Georgia (App., *infra*, 81a-108a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2010, upon consideration of petitioner's petition for a rehearing. On October 6, 2010, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including December 13, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

The federal courts of appeals are deeply divided regarding whether government officials who initiate prosecutions by providing false testimony in judicial proceedings are absolutely immune from civil suit. This conflict stems from the lower courts' differing views on how to reconcile two precedents of this Court, *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), and *Malley* v. *Briggs*, 475 U.S. 335 (1986). In *Briscoe*, this Court held that a police officer who allegedly committed perjury during a criminal trial was absolutely immune from civil liability because "[42 U.S.C.]

§ 1983 did not abrogate the absolute immunity [for testimony] existing at common law." 460 U.S. at 334.[1] In *Malley*, this Court held that a police officer *could* be held liable for wrongfully causing an arrest warrant to issue by submitting a legally invalid affidavit. The Court reasoned that officers who initiate prosecution in this manner function as complaining witnesses, who, unlike ordinary witnesses, were "not absolutely immune at common law." 475 U.S. at 340.[2]

These two lines of authority—the *Briscoe* line establishing absolute immunity for testimony in judicial proceedings, and the *Malley* line creating an exception from absolute immunity for complaining witnesses—collide when a government official gives testimony *as a complaining witness*. The Eleventh

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[1] Although *Briscoe* declined to decide whether absolute witness immunity applied to pretrial proceedings, 460 U.S. at 328 n.5, the majority of the courts of appeals have concluded that the reasoning underlying *Briscoe* supports extending the same protections to pretrial testimony. See *Lyles* v. *Sparks*, 79 F.3d 372, 378 (4th Cir. 1996); *Frazier* v. *Bailey*, 957 F.2d 920, 931 n.12 (1st Cir. 1992); *Anthony* v. *Baker*, 955 F.2d 1395, 1400-1401 (10th Cir. 1992); *Strength* v. *Hubert*, 854 F.2d 421, 423-425 (11th Cir. 1988), overruled on other grounds by *Whiting* v. *Traylor*, 85 F.3d 581 (11th Cir. 1996); *Williams* v. *Hepting*, 844 F.2d 138, 141-143 (3d Cir. 1988); *Holt* v. *Castaneda*, 832 F.2d 123, 124-127 (9th Cir. 1987); *Macko* v. *Byron*, 760 F.2d 95, 97 (6th Cir. 1985); *San Filippo* v. *U.S. Trust Co.*, 737 F.2d 246, 254 (2d Cir. 1984); *Kincaid* v. *Eberle*, 712 F.2d 1023, 1023-1024 (7th Cir. 1983); *Briggs* v. *Goodwin*, 712 F.2d 1444, 1448-1449 (D.C. Cir. 1983). But see *Wheeler* v. *Cosden Oil & Chem. Co.*, 734 F.2d 254, 261 n.16 (5th Cir. 1984), modified on other grounds by *Castellano* v. *Fragozo*, 352 F.3d 939 (5th Cir. 2005).

[2] This Court has since defined a complaining witness as one who "set[s] the wheels of government in motion by instigating a legal action." *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992).

Circuit in this case, along with the Third and Fourth Circuits in prior rulings, rejected the complaining witness exception for judicial testimony, relying on this Court's holding in *Briscoe*. The Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits, however, have reached the opposite conclusion, holding that the complaining witness exception applies to various forms of judicial testimony based on this Court's holding in *Malley*.[3]

As a result, the civil recourse available to individuals wrongfully indicted because of a government official's knowingly false testimony turns on no more than the jurisdiction in which they file suit. This Court should grant review to clarify the appropriate immunity standard for the testimony of complaining witnesses and to restore uniform access to Section 1983 remedies for victims of perjurious testimony.

A. Factual Background[4]

Petitioner Charles A. Rehberg, a forensic accountant, discovered evidence of unethical billing practices at Phoebe Putney Memorial Hospital in Albany, Georgia. See generally Compl., *United States ex rel. Rehberg* v. *Phoebe Putney Health Sys., Inc.*, No. 1:04-CV-162(WLS) (D. Ga. Oct. 25, 2004). Petitioner publicized his findings by sending a series of anonymous faxes to the hospital. App., *infra*, 3a. Respondent James P. Paulk was the Chief Investigator for the Office of the District Attorney of Dougherty County in Georgia; as a "favor" to the hospital, with whom he and the District Attorney had political connections, Paulk and the District Attorney launched a criminal investigation of petitioner. App., *infra*, 3a, 15a, 83a-85a.[5] The District Attorney's Office indicted petitioner on three separate occasions for allegedly harassing the recipients of his anonymous faxes and for assaulting a doctor, a crime that Paulk later acknowledged had never occurred. App., *infra*, 4a-6a. All three indictments were eventually dismissed as legally insufficient. App., *infra*, 5a-6a.

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[3] This petition uses the term "judicial testimony" and "judicial proceedings" to refer to testimony and proceedings relating to formal court actions before a judge or other factfinder such as a grand jury.

[4] The facts described herein are derived from the complaint, which the courts below accepted as true for purposes of resolving respondent's motion to dismiss. App., *infra*, 3a n.1 (citing *Jackson* v. *Okaloosa County, Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994)).

With respect to the first indictment, charging petitioner with aggravated assault, burglary, and making "harassing telephone calls," Paulk was the sole witness who testified, and he affirmed to the grand jury that his testimony consisted of "true and accurate facts." App., *infra*, 83a-84a. With respect to the second and third indictments against petitioner, for "simple assault" and "harassing phone calls," Paulk again testified before the grand jury, personally—though falsely—attesting to petitioner's conduct. App., *infra*, 84a-85a. Pursuant to the second and third indictments, petitioner was arrested and briefly detained. App., *infra*, 6a.

Paulk subsequently admitted that he made these accusations without any "knowledge or preparation."

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[5] The District Attorney of Dougherty County was Kenneth B. Hodges, III. After unfavorable press coverage about his relationship with the hospital, Hodges recused himself, and Kelly R. Burke was appointed as a special prosecutor in his stead. App., *infra*, 4a.

Compl. ¶ 17, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23, 2007). As he disclosed in a deposition, Paulk had gathered no evidence whatsoever prior to his grand jury testimony to indicate that petitioner had committed an assault or burglary, nor had Paulk ever interviewed any of the individuals whom he attested had been harassed by petitioner's faxes. Compl. ¶ 17, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23, 2007); App, *infra*, 83a-84a.

B. Proceedings Below

Following the dismissal of the indictments, petitioner filed a complaint in the United States District Court for the Middle District of Georgia against Paulk, alleging, in addition to various state law claims, three violations of 42 U.S.C. § 1983. App., *infra*, 6a-7a.[6] Petitioner accused Paulk of malicious prosecution in violation of the Fourth and Fourteenth Amendments, retaliatory investigation and prosecution in violation of petitioner's First Amendment free speech rights, and participation in evidence fabrication and conspiracy to violate petitioner's rights under the First, Fourth, and Fourteenth Amendments. App., *infra*, 6a-7a.

Respondent Paulk moved to dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, among other grounds, that he was entitled to absolute immunity for his testimony before the grand jury. According to respondent, "plaintiff cannot maintain *any* claim that would require consideration of the contents of Paulk's grand jury testimony." *Paulk and Dougherty County Mem. in Sup*port of Mot. to Dismiss 9, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Apr. 10, 2007) (emphasis added).

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[6] Kenneth B. Hodges, III, Kelly R. Burke, and Dougherty County were also named as defendants in petitioner's suit. See App. 81a, 108a. This petition concerns only the claims alleged against Paulk.

The district court identified Paulk as a complaining witness before the grand jury, App., *infra*, 83a, but did not decide whether the complaining witness exception to absolute immunity applied to his testimony. Rather, the court denied Paulk's motion to dismiss on the ground that his other non-testimonial acts as a complaining witness were sufficient to defeat his claim of absolute immunity. App., *infra*, 98a-100a.[7]

The Eleventh Circuit acknowledged that Paulk was a "complaining witness against Rehberg," App., *infra*, 4a, but it "reject[ed] Rehberg's 'complaining witness' exception to absolute immunity for false grand jury testimony." App., *infra*, 14a. The court reversed the district court's denial of Paulk's motion, holding that, under *Briscoe*, "[e]ven if Hodges and Paulk knew Paulk's testimony was false, Paulk receives absolute immunity for the act of testifying to the grand jury." App., *infra*, 12a (citing *Briscoe*, 460 U.S. at 326). The court distinguished *Malley* on the ground that the criminal complaint at issue in that case did not implicate the secrecy concerns associated with the grand jury. App., *infra*, 14a n.9. Even though it explicitly recognized that "[t]wo circuits [have] carved out a complaining-witness exception" for false testimony, App., *infra*, 14a n.9, the Eleventh

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[7] The district court rejected Paulk's qualified immunity claim because his alleged conduct violated petitioner's clearly established constitutional right. App., *infra*, 101a-102a.

Circuit dismissed the malicious prosecution claim against Paulk, thereby denying petitioner access to a remedy under Section 1983.[8]

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are deeply divided about whether government officials who act as complaining witnesses are entitled to absolute immunity from civil liability for their false testimony before grand juries and in other judicial proceedings. Seven courts of appeals have concluded that complaining witnesses should not have such immunity, while three—including the Eleventh Circuit in this case—have concluded that even complaining witnesses should be absolutely immune for perjuriously initiating the false prosecution of innocent citizens.

The conflict among courts of appeals is the result of the lower courts' different approaches to reconciling this Court's decisions in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), extending absolute immunity to government officials for their trial testimony, and *Malley* v. *Briggs*, 475 U.S. 335 (1986), denying absolute immunity to government officials for initiating false prosecutions.

The Eleventh Circuit here disregarded the crucial distinction that this Court drew in *Malley* between ordinary witnesses—who merely testify about facts—and complaining witnesses—who initiate prosecutions. At common law and under this Court's precedent, absolute immunity attaches to ordinary witnesses lest the threat of civil liability for defamatory statements deter them from testifying at all or from testifying truthfully. That absolute immunity does not extend to complaining witnesses, who by definition have actively and voluntarily come forward to initiate a criminal prosecution.

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[8] The Eleventh Circuit resolved petitioner's retaliatory prosecution claim by affirming the district court's denial of Paulk's motion to dismiss. App., *infra*, 34a. It resolved petitioner's conspiracy claim by reversing the district court's denial of Paulk motion to dismiss, and holding that the claim was barred by the intracorporate conspiracy doctrine. App., *infra*, 43a-44a.

This Court should grant review to clarify—and restore uniformity to—the law governing immunity under Section 1983 for complaining witnesses who testify falsely.

A. The Courts Of Appeals Disagree Sharply About Whether Complaining Witnesses Are Entitled To Absolute Immunity For Giving Testimony In Judicial Proceedings.

The federal courts of appeals are deeply divided as to whether complaining witnesses are exempt from the absolute immunity otherwise enjoyed by witnesses in grand jury and other judicial proceedings.[9] Many federal appeals court decisions—

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[9] Seven circuits recognize the complaining witness exception for grand jury or other type of judicial testimony. See *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Cervantes* v. *Jones*, 188 F.3d 805, 809-810 (7th Cir. 1999), overruled on other grounds by *Newsome* v. *McCabe*, 256 F.3d 747 (7th Cir. 2001); *Harris* v. *Roderick*, 126 F.3d 1189, 1198-1199 (9th Cir. 1997); *Anthony* v. *Baker*, 955 F.2d 1395, 1399-1401 (10th Cir. 1992); *Enlow* v. *Tishomingo County, Miss.*, 962 F.2d 501, 511-512 (5th Cir. 1992); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 422-423 (D.C. Cir. 1991); *White* v. *Frank*, 855 F.2d 956, 958-961 (2d Cir. 1988). Three circuits reject the complaining witness exception for judicial testimony. See, *e.g.*, *Jones* v. *Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999); *Lyles* v. *Sparks*,

including the decision below—explicitly acknowledge this conflict. See, *e.g.*, App., *infra*, 14a n.9 (contrasting its decision upholding absolute immunity with rulings by "[t]wo circuits [that] carved out a complaining-witness exception to absolute immunity for false grand jury testimony."); *Jones* v. *Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999) ("[A]lthough *Mastroianni* [v. *Bowers*, 173 F.3d 1363 (11th Cir. 1999)] cites circuits adopting an exception for complaining witnesses, we agree with the Third Circuit's rejection of that approach * * *."); *Harris* v. *Roderick*, 126 F.3d 1189, 1199 n.11 (9th Cir. 1997) ("There is also a minority view. The Third Circuit * * * expressly rejected the reasoning of [the Second and Tenth Circuits] * * * and refused to read the complaining witness exception in *Malley* as overriding the broad protection for law enforcement witnesses set forth in *Briscoe* * * *."); *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992) (noting that the Second and Tenth Circuits "have pointed out the tension between the Supreme Court's sweeping protection of all witness testimony in *Briscoe*, and the common law distinction, noted in *Malley* * * *, between lay witnesses (absolutely protected) and complaining witnesses in malicious prosecution suits (not absolutely protected). * * * [T]his court has been criticized for failing to emphasize the distinction.").

The result of this conflict is that, for many victims of malicious prosecution, the availability of civil remedies depends solely on where the misconduct—and the resulting suit—happens to take place. That is exactly what happened in this case. Had petitioner suffered the same constitutional injury in one of the

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79 F.3d 372, 378 (4th Cir. 1996); *Kulwicki* v. *Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992).

seven circuits that recognize the complaining witness exception, rather than in one of the three that reject it, he would have had a remedy for Paulk's perjured testimony falsely accusing him of a crime.

1. *Seven Circuits Recognize The Complaining Witness Exception For Judicial Testimony On The Basis Of* Malley.

The Eleventh Circuit's holding conflicts with decisions of the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits.

In *White* v. *Frank*, 855 F.2d 956 (2d Cir. 1988), the Second Circuit considered a Section 1983 suit against a police officer who had perjured himself before a grand jury in order to obtain a narcotics indictment. *Id.* at 957. Noting the "subtle but crucial" common law distinction between witnesses "whose role was limited to providing testimony" and witnesses "who played a role in initiating a prosecution—complaining witnesses," *id.* at 958-959, the court held that the officer's "role as a 'complaining witness' render[ed] him liable to the victim under Section 1983, just as it did at common law." *Id.* at 961. According to the Second Circuit, *Briscoe* was inapposite because it concerned absolute immunity against suits for defamation, whereas *Malley* governed suits for malicious prosecution. *Ibid.*

Likewise, the Fifth Circuit has concluded that *Briscoe* does not control in an action for malicious prosecution against a complaining witness: "In advocating the extension of *Briscoe* and other such cases to his grand jury testimony, [defendant police officer] obfuscates a crucial distinction. * * * [A]t common law, complaining witnesses were not absolutely immune." *Enlow* v. *Tishomingo County, Miss.*, 962 F.2d

501, 511 & n.29 (5th Cir. 1992); see also *Keko* v. *Hingle*, 318 F.3d 639, 643 (5th Cir. 2003) ("[W]hen either a police officer or a prosecutor becomes a 'complaining witness' in a probable cause hearing, neither official may claim absolute immunity.").

The Tenth Circuit, in adopting the complaining witness exception, also relied on this Court's holding in *Malley*. See *Anthony* v. *Baker*, 955 F.2d 1395, 1399-1401 (10th Cir. 1992). That case, like petitioner's, involved a claim that a law enforcement officer had procured an indictment against the plaintiff by presenting false evidence to the grand jury. Citing *Malley*, the court opined, "we are not convinced that the common law granted absolute immunity to a complaining witness who initiated—at least in part—a baseless prosecution by giving false testimony at a grand jury proceeding." *Id.* at 1399; see also *PJ ex rel. Jensen* v. *Wagner*, 603 F.3d 1182, 1195 (10th Cir. 2010) (noting that "the [appellants] correctly point out that a complaining witness is not entitled to absolute immunity").

The Ninth Circuit, too, denies absolute immunity to complaining witnesses before the grand jury. See *Kulas* v. *Flores*, 255 F.3d 780, 783 n.1 (9th Cir. 2001) ("Grand jury witnesses are generally immune from suit under § 1983 for their testimony. However, there is an exception to this immunity for law enforcement witnesses functioning as 'complaining witnesses.'") (internal citations omitted).

Indeed, the Ninth Circuit has gone beyond the holdings of the Second, Fifth, and Tenth Circuits to apply the complaining witness exception to *trial* as well as pretrial testimony. In *Harris* v. *Roderick*, 126 F.3d 1189 (9th Cir. 1997), the court denied immunity to two deputy United States marshals for their allegedly false testimony before a grand jury *and* at the subsequent trial. *It explained that Briscoe did not* control because the marshals initiated and continued the prosecution through their own perjurious testimony: "We do not believe that the general policy that immunizes false official testimony requires that we *preclude [plaintiff] from showing the full range of* occasions on which [defendants'] falsehoods were uttered, simply because some of them occurred before a grand *or petit jury*." *Id.* at 1199 (emphasis added).

The Seventh Circuit also recognizes the complaining witness exception. See *Curtis* v. *Bembenek*, 48 F.3d 281, 285 n.5 (7th Cir. 1995) (noting that, at common law, "although an ordinary witness could *not* be sued at all, a 'complaining witness' (*i.e.*, the private party who actively instigated or encouraged the suit) could be sued for malicious prosecution"). The Seventh Circuit, like the Ninth, has stated that the complaining witness exception applies to *all* testimony, not just pretrial testimony. *Cervantes* v. *Jones*, 188 F.3d 805, 809 (7th Cir. 1999) ("An exception to this *wall of immunity for trial and pretrial testimony* exists for a 'complaining witness.'") (emphasis added), overruled on other grounds in *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001).

Although the Sixth Circuit has not squarely ruled on this issue, it has applied the complaining witness exception to probable cause hearings, using language that suggests it would apply the exception to other *ex parte* pretrial proceedings such as grand jury proceedings. See *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003) ("Shaw testified at an *ex parte* proceeding where his actions were that of a 'complaining witness' rather than a 'testifying witness.' Because a complaining witness is not protected by absolute immunity, neither is Shaw."). In contrast to the Ninth Circuit, however, the Sixth Circuit has explicitly held that the complaining witness exception "does not extend to testimony delivered at trial." *Moldowan* v. *City of Warren*, 578 F.3d 351, 390 (6th Cir. 2009), cert. denied, 130 S. Ct. 3504 (2010).

Likewise, the District of Columbia Circuit appears to recognize a complaining witness exception, which it calls "Perjurer's Liability" and defines as "assert[ing] that someone who causes an indictment and consequent arrest by perjuring himself or arranging for the submission of perjured testimony before the grand jury violates the Fourth Amendment." *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 419 (D.C. Cir. 1991). In a case involving an allegedly racially-motivated prosecution initiated through false grand jury testimony, the court declared, "Perjurer's Liability is a valid constitutional tort theory * * *. The Supreme Court's reasoning in *Malley v. Briggs* would appear to settle that question." *Id.* at 423 (internal citation omitted); *cf. Gray* v. *Poole*, 275 F.3d 1113, 1119 (D.C. Cir. 2002) ("*Kalina* [v. *Fletcher*, 522 U.S. 118 (1997)] confirms that officials who serve as complaining witnesses receive qualified, not absolute, immunity.")

The majority of circuits that have considered this question thus interpret *Malley* as creating an exception to *Briscoe* applicable when a government official functions as a complaining witness before a grand jury or in other judicial proceedings.

2. *Three Circuits Refuse To Recognize The Complaining Witness Exception For Judicial Testimony On The Basis Of* Briscoe.

The Third, Fourth, and Eleventh Circuits have reached the opposite conclusion, holding that *Briscoe* controls in all cases of perjured testimony, even when a government official functions as a complaining witness.

In *Kulwicki* v. *Dawson*, 969 F.2d 1454 (3d Cir. 1992), the Third Circuit "decline[d] to interpret the language in *Malley* as overriding the broad witness protection announced in *Briscoe*." *Id.* at 1467 n.16. Although *Kulwicki* involved only trial, and not pretrial, testimony, the Third Circuit has also cited it for the proposition that complaining witnesses who testify before a grand jury are entitled to the same absolute immunity as trial witnesses. *Knight* v. *Poritz*, 157 Fed. App'x 481, 487 (3d Cir. 2005) (*per curiam*) (noting that "[i]n *Kulwicki*, we expressly rejected the argument that *Malley* carved out an exception to the general rule announced in *Briscoe v. LaHue* that government witnesses are afforded absolute immunity for statements made while testifying") (internal citation omitted).

The Eleventh Circuit declared in *Jones* v. *Cannon*, 174 F.3d 1271 (11th Cir. 1999), that it "expressly reject[s] carving out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." *Id.* at 1287 n.10. In that case, the plaintiff, who had been acquitted of two felony charges, alleged that the detective had purposely obtained a baseless indictment against him by lying to the grand jury. *Id.* at 1277-1279. Despite the detective's prominent role in initiating the prosecution, the Eleventh Circuit found that he was entitled to absolute immunity for his grand jury testimony. *Id.* at 1287. The court expressed concern that civil liability "would emasculate * * * the confidential nature of grand jury proceedings," concluding that the "remedy for false grand jury testimony is criminal prosecution for perjury." *Id.* at 1287 n.10.

The Fourth Circuit has reached the same result, albeit without explicitly referencing the complaining witness exception. In *Lyles* v. *Sparks*, 79 F.3d 372 (4th Cir. 1996), the plaintiffs brought a claim of "Perjurer's Liability," alleging that they had been wrongfully indicted on the basis of perjurious grand jury testimony. The court found that, under *Briscoe*, the defendant was entitled to "absolute immunity from the Perjurer's Liability claim." *Id.* at 378. At least one district court within the Fourth Circuit has stated that it understands *Lyles* to extend absolute immunity to complaining witnesses who testify. See *Collis* v. *United States*, 498 F. Supp. 2d 764, 771 (D. Md. 2007) ("Although it does not refer to the 'complaining witness' doctrine by name, but instead refers to such claims as 'Perjurer's Liability,' the Fourth Circuit has held that *Briscoe* controls such situations.").

In sum, there plainly is a deep and persistent division among the courts of appeals concerning the status and scope of the complaining witness exception. This Court should grant the petition to resolve the stark disagreement among the lower courts.

B. This Case Presents A Frequently Recurring Issue Of Substantial Importance.

Whether government officials may be held accountable for initiating a prosecution through perjurious testimony is a question that arises with considerable frequency throughout the United States, as the large number of circuit and district court decisions addressing this issue demonstrates. We have identified over 50 cases raising the complaining witness exception, spread throughout ten circuits and the federal district courts of twenty states.[10]

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[10] See, *e.g.*, *Watson* v. *Grady*, No. 09-CV-3055 (KMK), 2010 WL 3835047, at *5-*7 (S.D.N.Y. Sept. 30, 2010); *Jarvis* v. *Eaton*, No. 08-14221-BC, 2010 WL 3565809, at *4-*5 (E.D. Mich. Sept. 13, 2010); *Kerns* v. *Board of Comm'rs of Bernalillo County*, 707 F. Supp. 2d 1190, 1278-1279 (D.N.M. 2010); *McGuire* v. *Warner*, No. 05-40185, 2009 WL 2423173, at *2-*3 (E.D. Mich. Aug 3, 2009); *Manganiello* v. *City of New York*, No. 07 Civ. 3644(HB), 2008 WL 2358922, at *7-*8 (S.D.N.Y. June 10, 2008); *Finwall* v. *City of Chicago*, 490 F. Supp. 2d 918, 926 (N.D. Ill. 2007); *Chicago United Industries, Ltd.* v. *City of Chicago*, No. 05 C 5011, 2007 WL 1100746, at *7 (N.D. Ill. Apr. 10, 2007); *Hornung* v. *Madarang*, No. C06-2340 TEH, 2006 WL 3190671, at *4-*5 (N.D. Cal. Nov. 2, 2006); *Ester* v. *Faflak*, Civil No. 05-0049 (PJS/JSM), 2006 WL 2700288, at *15 (D. Minn. Sept. 18, 2006); *Caudill* v. *Owen*, No. 1:02CV663, 2005 WL 2654228, at *7 (S.D. Ohio Oct. 17, 2005); *Norris* v. *City of Aurora*, No. Civ.A.03CV1334WDMBNB, 2005 WL 1768758, at *7-*8 (D. Colo. July 25, 2005); *Orange* v. *Burge*, No. 04 C 0168, 2005 WL 742641, at *12 (N.D. Ill. Mar. 30, 2005); *Scott* v. *Vasquez*, No. CV 02-05296 GAF(AJW), 2004 WL 746259, at *3 (C.D. Cal. Feb. 18, 2004); *Crawford* v. *Pennsylvania*, No. Civ.A. 1:CV-03-693, 2003 WL 22169372, at *6-*8 (M.D. Pa. Sept. 12, 2003); *Pace* v. *Platt*, No. 3:01-CV-471/LAC, 2002 WL 32098709, at *5 (N.D. Fla. Sept. 10, 2002); *Evans* v. *City of Chicago*, No. 00 C 7222, 2001 WL 1028401, at *9 n.12 (N.D. Ill. Sept. 6, 2001); *Cipolla* v. *County of Rensselaer*, 129 F. Supp. 2d 436, 450-451 (N.D.N.Y. 2001); *Pierce* v. *Pawelski*, No. 98 C 3337, 2000 WL 1847778, at

Of the courts of appeals that recognize the complaining witness exception, many have explicitly focused on false testimony presented before the grand jury—precisely the issue in this case. The complaining witness exception serves as an especially critical protection in this context because the grand jury system provides defendants with far fewer procedural protections than most other judicial proceedings.

Prosecutors generally have no obligation to present exculpatory evidence to grand juries, grand jurors may consider evidence that would not be inadmissible at trial, and defendants ordinarily have no right to testify, present evidence, or even to be present for any part of the grand jury proceedings. "Consequently, the grand jurors hear only the evidence the prosecutor wants them to hear—'the most inculpatory version of the facts possible, regardless of whether that version is based on evidence that will be considered at trial.'" Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L.J. 323, 328 (2004) (internal citations omitted). See also Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 Geo. L.J. 1265, 1293 (2006) (noting that because grand juries are neither fully prosecutorial nor judicial in nature, "the contradictory result [is] that grand jury action is deemed 'judicial' in effect, yet

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*5 (N.D. Ill. Dec. 14, 2000); *Sciance* v. *Muskingum County*, No. C2-98-1075, 2000 WL 1460076, at *5 (S.D. Ohio Sept. 29, 2000); *Walker* v. *Mendoza*, No. 00-CV-93(JG), 2000 WL 915070, at *6 (E.D.N.Y. June 27, 2000); *Mejia* v. *City of New York*, 119 F. Supp. 2d 232, 272-273 (E.D.N.Y. 2000); *Steeves* v. *McGrath*, No. 99 C 4567, 2000 WL 198895, at *2 (N.D. Ill. Feb. 11, 2000).

carries none of the procedural rights that normally characterize judicial action").

Perjury in such proceedings by government officials acting as complaining witnesses, especially by law enforcement officers, can have devastating effects on individuals wrongfully indicted, even when no conviction results. This Court itself has recognized the "adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives." *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (plurality opinion). "An innocent suspect may have the charges dismissed or may be acquitted, but the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused." Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 Nw. U. L. Rev. 1297, 1299 (2000). Ultimately, though, the impact extends far beyond those individuals who are wrongfully indicted, as misconduct by government officials "diminishes one of our most crucial 'social goods'—trust in government." Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. Colo. L. Rev. 1037, 1039 (1996).

Whether a victim of false testimony will be able to vindicate his claim often will depend on whether a jurisdiction applies the complaining witness exception. Because claims of absolute and qualified immunity must be raised and resolved early in litigation, recognition of the complaining witness exception typically determines whether a Section 1983 claim involving false testimony survives a motion to dismiss. See *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); ***Mireles* v. *Waco***, 502 U.S. 9, 11 (1991) (*per curiam*) ("Judicial immunity is an immunity from suit, not just from ultimate assessment of damages.").

Several examples are illustrative:

- In *Garrett* v. *Stanton*, No. 08-0175-WS-M, 2009 WL 4258135 (S.D. Ala. Nov. 19, 2009), the lack of a complaining witness exception meant there was no relief against a police officer whose misidentification led to the indictment of a "wheelchair-bound stroke victim" on multiple drug charges. *Id.* at *1. The court in *Garrett* criticized the Eleventh Circuit's categorical rule, which "creates the somewhat anomalous result that a law enforcement officer who seeks to obtain a warrant by falsely testifying before a grand jury is entitled to absolute immunity, while one who does so via false affidavit submitted to a judge is not." *Id.* at *8 n.23.
- In *Pace* v. *Platt*, No. 3:01-CV-471/LAC, 2002 WL 32098709 (N.D. Fla. Sept. 10, 2002), the absence of a complaining witness exception meant that an Ohio lawyer indicted on eighty-one counts of criminal activity and acquitted of seventy-eight of them had no recourse against an IRS agent who falsely testified before a grand jury about the results of his criminal investigation.
- In *Ester* v. *Faflak*, No. 05-0049(PJS/JSM), 2006 WL 2700288 (D. Minn. Sept. 18, 2006), the lack of a complaining witness exception

> meant no relief for a plaintiff who spent five months in prison after a Homeland Security agent, attempting to obtain information about an unrelated murder, falsely accused the plaintiff before a grand jury of purchasing a controlled narcotic.

* * * * *

This case presents an ideal vehicle to resolve the deeply entrenched conflict over the complaining witness exception for judicial testimony. This is the quintessential complaining witness case: respondent Paulk allegedly instigated the indictments, personally attested to the veracity of evidence that he knew was false, and did so while testifying before a grand jury. The parties directly raised the complaining witness issue in their pleadings, the Eleventh Circuit ultimately resolved the issued by selecting between this Court's rulings in *Briscoe* and *Malley*, and in doing so the Eleventh Circuit explicitly acknowledged that its decision diverged from the views of other circuits.

C. The Decision Below Ignored The Common Law Complaining Witness Exception To Absolute Immunity And Incorrectly Applied This Court's Precedents.

Government officials sued in Section 1983 actions typically are entitled only to *qualified* immunity for acts performed in the course of their duties. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982) ("For executive officials in general, * * * qualified immunity represents the norm.").[11] Officials enjoy *absolute* immunity only for certain acts "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976).[12]

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[11] See also *Butz* v. *Economou*, 438 U.S. 478, 506 (1978) (noting that "federal officials who seek absolute exemption from per-

This Court determines the nature of an official's immunity from Section 1983 liability based in large part on the common law immunities that existed in 1871, when the statute was enacted. See, *e.g.*, *Malley*, 475 U.S. at 339-340 ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common law counterpart to the privilege he asserts."); *Briscoe* v. *LaHue*, 460 U.S. at 330 ("It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common law principles, including defenses * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.").

As the Court has recognized, there was no absolute immunity at common law for government officials functioning as complaining witnesses. *Malley*, 475 U.S. at 340-341 ("[C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a

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sonal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.").

[12] See also *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009) (absolute prosecutorial immunity in a Section 1983 suit against a prosecutor for failure to disclose impeachment material); *Burns* v. *Reed*, 500 U.S. 478, 492-496 (1991) (absolute prosecutorial immunity for participating in probable cause hearing, but not for giving legal advice to police).

complaint could be held liable if the complaint was made maliciously and without probable cause.") (citing *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *Randall* v. *Henry*, 5 Stew. & P. 367 (Ala. 1834); *Bell* v. *Keepers*, 14 P. 542 (Kan. 1887); *Finn* v. *Frink*, 24 A. 853 (Me. 1892); 4 William Wait, Actions and Defenses 352-356 (1878)).

The Court invoked the common law complaining witness exception to hold in *Malley* that a police officer functioning as a complaining witness did not enjoy absolute immunity from Section 1983 claims. *Malley*, 475 U.S. at 342 ("[S]ince [Section 1983] on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.") (emphasis in original).

Malley set forth a powerful justification for applying only qualified, rather than absolute, immunity to officers acting as complaining witnesses: "[A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, before submitting a request for a warrant, upon whether he has a reasonable basis for believing that his affidavit establishes probable cause. * * * [S]uch reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature." *Id.* at 343.

Because this case involves a complaining witness and not an ordinary witness, it is controlled by *Malley* and not *Briscoe*. *Briscoe* drew on the common law history of immunity for parties and witnesses testifying in judicial proceedings, which dates back as early as the sixteenth century. See *Briscoe*, 460 U.S. at 330-331 (citing English common law cases up to the nineteenth century). Such immunity was granted based on the fear that damages liability might lead to self-censorship in which "witnesses might be reluctant to come forward to testify" in the first place or that "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Briscoe*, 460 U.S. at 333. Such concerns about self-censorship do not apply to complaining witnesses, who, by definition, have complained openly and voluntarily to instigate legal action.

The Court's decision in *Kalina* v. *Fletcher*, 522 U.S. 118 (1997), confirms that the complaining witness doctrine established in *Malley* reaches a broad range of cases. *Kalina* explained that officials could function as complaining witnesses in a variety of contexts, applying *Malley*'s complaining witness exception from absolute immunity to a prosecutor who executed a certificate of probable cause. See *Kalina*, 522 U.S. at 129-130 ("Although the law required that [certification of probable cause] to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed.").

Kalina also specifically suggested that the complaining witness exception applies to testimony. *Id.* at 130-131 ("Testifying about facts is the function of the witness, not of the lawyer. * * * Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.").

The justifications for applying the complaining witness exception to the submission of affidavits (in *Malley*) and certifications of probable cause (in *Ka-*

lina) apply with equal force when an official is functioning as a complaining witness by testifying in a grand jury or other judicial proceeding. Just as warrants should not issue on false pretenses, indictments should not result from false testimony such as that alleged in this case. See Eugene Scalia, Comment, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1458 (1989) ("[S]ubjecting police officers to suit for statements made in judicial proceedings does not necessarily deter them from effectively performing their jobs. Potentially, it merely handles police liability with the same solicitude for public and private interests expressed by the early common-law courts, and evinced by the Supreme Court in *Briscoe*.").

This Court has placed no limitations on the complaining witness exception, and *Kalina*'s broad reading of the exception—to allow it to apply even to a prosecutor—suggests it should not exclude grand jury or other judicial testimony. Rather, the reasoning of *Malley* and *Kalina* should apply here to preclude respondent from invoking absolute immunity for his false testimony as a complaining witness before the grand jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A.
Vroon LLC
1718 Peachtree Street,
Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

DECEMBER 2010

APPENDICES

APPENDIX A

Filed July 16, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-11897

D. C. Docket No. 07-00022-CV-WLS-1

CHARLES A. REHBERG,

Plaintiff-Appellee,

versus

JAMES P. PAULK,
in his individual capacity,
KENNETH B. HODGES, III,
in his individual capacity and
in his official capacity as District
Attorney of Dougherty County
KELLY R. BURKE, in his
individual capacity,

Defendants-Appellants,

DOUGHERTY COUNTY,

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia

(July 16, 2010)

ON PETITION FOR PANEL REHEARING

Before CARNES, HULL and ANDERSON, Circuit Judges.

HULL, Circuit Judge:

Upon consideration of Plaintiff-Appellee's petition for rehearing and to the extent it seeks panel rehearing, we vacate the prior opinion in this case, issued on March 11, 2010 and published at 598 F.3d 1268 (11th Cir. 2010), and substitute the following opinion in its place. Plaintiff-Appellee's petition for panel rehearing is granted in part and denied in part.

In this § 1983 action, Plaintiff Charles Rehberg sued former District Attorney Kenneth Hodges, specially appointed prosecutor Kelly Burke, and Chief Investigator James Paulk, alleging federal claims for malicious prosecution, retaliatory investigation and prosecution, evidence fabrication, and conspiracy to violate Rehberg's constitutional rights. Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denial of absolute and qualified immunities. After review and oral argument, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

We review Rehberg's version of the events as alleged in his complaint, accepting them as true.[1]

A. The Investigation

From September 2003 to March 2004, Plaintiff Rehberg sent anonymous faxes to the management of Phoebe Putney Memorial Hospital (the "hospital"). The faxes criticized and parodied the management and activities of the hospital.

Defendant Hodges, then the District Attorney of Dougherty County, Georgia, and Defendant Paulk, the Chief Investigator in the District Attorney's Office, investigated Rehberg's actions as a "favor" to the hospital, to which Hodges and Paulk are alleged to have political connections. Rehberg alleges Hodges and Paulk lacked probable cause to initiate a criminal investigation of him.

From October 2003 to February 2004, Defendants Hodges and Paulk prepared a series of subpoenas on Hodges's letterhead and issued the subpoenas to BellSouth and Alltel (later Sprint), requesting Rehberg's telephone records. "Mr. Paulk also prepared and issued a subpoena to Exact Advertising, the Internet service provider of one of Mr. Rehberg's email accounts, and obtained Mr. Rehberg's personal e-mails that were sent and received from his personal computer." Compl. ¶ 37, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23,

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[1] In reviewing a Rule 12(b)(6) motion to dismiss, we accept as true the factual allegations in the complaint and all reasonable inferences therefrom. Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994).

2007). Although no grand jury was impaneled at the time, the subpoenas purported to require appearance before a Dougherty County grand jury. Rehberg's case was not presented to a grand jury until December 14, 2005.

Defendant Paulk gave the results of the subpoenas, consisting of Rehberg's personal emails and phone records, to private civilian investigators, who allegedly directed the substance of the subpoenas. These civilian investigators paid the District Attorney's Office for Rehberg's information, often making payments directly to BellSouth and the other subpoenaed parties, allegedly to pay debts of the District Attorney's Office.

After receiving unfavorable press coverage of his relationships with the hospital, Hodges recused himself from prosecuting Rehberg. Burke was appointed a special prosecutor in Hodges's place. Hodges continued to supervise Paulk and remained in communication with Burke throughout the investigation, but he "never served as the actual prosecutor of the charges against Mr. Rehberg before the Grand Jury."

B. First Indictment

On December 14, 2005, a grand jury indicted Rehberg on charges of aggravated assault, burglary, and six counts of "harassing phone calls." Burke was the prosecutor, and Paulk was the sole complaining witness against Rehberg before the grand jury. The first indictment alleged Rehberg assaulted Dr. James Hotz after unlawfully entering Dr. Hotz's home. In fact, Rehberg has never been to Dr. Hotz's home, and Dr. Hotz never reported an assault or burglary to law enforcement agencies. Paulk later admitted that he never interviewed any witnesses or gathered evidence indicating Rehberg committed an aggravated assault or burglary. And the alleged "harassing" phone calls to Dr. Hotz all were related to the faxes Rehberg had already sent criticizing the hospital.

The City of Albany Police Department[2] did not participate in the investigation. Paulk stated that he and Hodges initiated and handled the investigation on their own because they lacked confidence in the police department's ability to handle the investigation.

Rehberg contested the legal sufficiency of the first indictment. On February 2, 2006, Defendant Burke dismissed and nol-prossed the first indictment.

C. Second Indictment

On February 15, 2006, Defendants Burke and Paulk initiated charges before a second grand jury. Paulk and Dr. Hotz appeared as witnesses. The grand jury issued a second indictment, charging Rehberg with simple assault against Dr. Hotz on August 22, 2004 and five counts of harassing phone calls.

Rehberg contested the sufficiency of the second indictment too. Rehberg alleged he was "nowhere near Dr. Hotz on August 22, 2004," and "[t]here was no evidence whatsoever that Mr. Rehberg committed an assault on anybody as he was charged." At a pretrial hearing on April 10, 2006, Defendant Burke announced the second indictment would be dismissed, but Burke did not dismiss it. On July 7, 2006, the state trial court ordered it dismissed.

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[2] The City of Albany, Georgia, is in Dougherty County.

D. Third Indictment

On March 1, 2006, Defendants Burke and Paulk appeared before a third grand jury and secured a third indictment against Rehberg, charging him with simple assault and harassing telephone calls. At some unspecified time, Rehberg was arrested and briefly detained pursuant to an arrest warrant issued as a result of the second and third indictments.

On May 1, 2006, the state trial court issued two orders dismissing all charges against Rehberg because the third indictment did not sufficiently charge Rehberg with a criminal offense.

The three indictments against Rehberg were widely reported in the local press. Defendant Burke conducted interviews with the press and issued statements saying: (1) "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them," and (2) "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming."

E. District Court Proceedings

Plaintiff Rehberg filed a verified complaint against Defendants Hodges, Burke, and Paulk, in their individual capacities. Rehberg's complaint alleges ten counts, including these four federal § 1983 claims at issue in this appeal:[3] (1) malicious prosecution against Hodges and Paulk in violation of Rehberg's Fourth and Fourteenth Amendment rights (Count 6); (2) retaliatory investigation and prosecution against Hodges and Paulk, for their alleged retaliation against Rehberg because he exercised First Amendment free speech rights (Count 7); (3) participation in evidence fabrication, calling Paulk to give false testimony to the grand jury, and giving false statements to the media against Burke only (Count 8); and (4) conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth Amendments, against Hodges, Burke, and Paulk (Count 10).[4]

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[3] Rehberg's complaint also alleges state-law claims for negligence (Counts 1 & 2) and invasion of privacy (Counts 3 & 4) against Paulk, which the district court refused to dismiss. At this juncture, Defendant Paulk has not appealed the district court's rulings on those state-law claims. At oral argument,

Defendants Hodges, Burke, and Paulk moved to dismiss these counts pursuant to Federal Rule of Civil Procedure 12(b)(6). They claimed absolute immunity, and, alternatively, qualified immunity. The district court denied the Defendants' motions.

Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denials of immunity as to Rehberg's above four federal

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counsel for Defendant Paulk confirmed to the Court that the state-law claims in Counts 1, 2, 3, and 4 against Paulk were not on appeal.

[4] Plaintiff Rehberg also sued Dougherty County and Hodges, in his official capacity. Rehberg withdrew Count 5 against Dougherty County in response to its claim of sovereign immunity. Rehberg has not appealed the district court's dismissal of Count 9 against Dougherty County, which effectively dismissed Count 9 against Hodges because an official capacity claim against Hodges is another moniker for a claim against Dougherty County, Hodges's employer. See Brown v. Neumann, 188 F.3d 1289, 1290 (11th Cir. 1999). Thus only Counts 6, 7, 8, and 10 are involved in this appeal.

constitutional claims.[5] We discuss absolute and qualified immunity and then Rehberg's claims.

II. IMMUNITY LAW

A. Absolute Immunity

Traditional common-law immunities for prosecutors apply to civil cases brought under § 1983. Imbler v. Pachtman, 424 U.S. 409, 427-28, 96 S. Ct. 984, 993-94 (1976). "[A]t common law, '[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution.'" Malley v. Briggs, 475 U.S. 335, 342, 106 S. Ct. 1092, 1097 (1986) (quoting Imbler, 424 U.S. at 437, 96 S. Ct. at 998). In § 1983 actions, prosecutors have absolute immunity for all activities that are "'intimately associated with the judicial phase of the criminal process.'" Van de Kamp v. Goldstein, __ U.S. __, 129 S.Ct. 855, 860 (2009) (quoting Imbler, 424 U.S. at 430, 96 S. Ct. at 995); accord Jones v. Cannon, 174 F.3d 1271, 1281 (11th Cir. 1999).

Absolute immunity does not depend entirely on a defendant's job title, but involves a functional approach granting immunity based on conduct. Jones, 174 F.3d at 1282. This functional approach looks to "the nature of the function performed, not the identity of the actor who performed it." Buckley v. Fitzsimmons, 509 U.S. 259, 269, 113 S. Ct. 2606, 2613

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[5] *The denial of absolute or qualified immunity* on a motion to dismiss is an appealable interlocutory order. See Jones v. Cannon, 174 F.3d 1271, 1280-81 (11th Cir. 1999); Maggio v. Sipple, 211 F.3d 1346, 1350 (11th Cir. 2000) (citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)). We review de novo the district court's denial of a motion to dismiss on the basis of absolute or qualified immunity. Maggio, 211 F.3d at 1350; Scarbrough v. Myles, 245 F.3d 1299, 1302 (11th Cir. 2001).

(1993); accord Imbler, 424 U.S. at 431 n. 33, 96 S. Ct. at 955 n. 33.

Absolute immunity accordingly applies to the prosecutor's actions "in initiating a prosecution and in presenting the State's case." Imbler, 424 U.S. at 431, 96 S. Ct. at 955. Prosecutors are immune for appearances in judicial proceedings, including prosecutorial conduct before grand juries, statements made during trial, examination of witnesses, and presentation of evidence in support of a search warrant during a probable cause hearing. Burns v. Reed, 500 U.S. 478, 490-92, 111 S. Ct. 1934, 1942 (1991); Kalina v. Fletcher, 522 U.S. 118, 126, 118 S. Ct. 502, 507-08 (1997); see also Van de Kamp, 129 S.Ct. at 861. "A prosecutor enjoys absolute immunity from allegations stemming from the prosecutor's function as advocate." Jones, 174 F.3d at 1281. Such absolute immunity also "extends to a prosecutor's acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." Id. (quotation marks omitted); accord Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1279-80 (11th Cir. 2002) (holding prosecutor who proffered perjured testimony and fabricated exhibits at trial is entitled to absolute immunity, but a prosecutor who participated in the search of a suspect's apartment is entitled to only qualified immunity).

If a prosecutor functions in a capacity unrelated to his role as an advocate for the state, he is not protected by absolute immunity but enjoys only qualified immunity. Kalina, 522 U.S. at 121, 118 S. Ct. at 505 (concluding prosecutor was acting as a witness in personally attesting to truth of averments in a "Certification for Determination of Probable Cause" for an arrest warrant and was not absolutely immune for that witness act, but that prosecutor was absolutely immune for preparing and filing an "information charging respondent with burglary and a motion for an arrest warrant"); Buckley, 509 U.S. at 275-77, 113 S. Ct. at 2616-18 (concluding prosecutor's pre-indictment fabrication of third-party expert testimony linking defendant's boot to bootprint at murder scene and post-indictment participation in a press conference were not protected by absolute immunity); Burns, 500 U.S. at 496, 111 S. Ct. at 1944-45 (stating prosecutors do not enjoy absolute immunity for giving pre-indictment legal advice to the police). A prosecutor is not entitled to absolute immunity when he "performs the investigative functions normally performed by a detective or police officer." Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; accord Jones, 174 F.3d at 1281-82 ("Although absolutely immune for actions taken as an advocate, the prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state"); see also Malley, 475 U.S. at 340-41, 106 S. Ct. at 1096 (concluding police officer was not absolutely immune for drafting "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants).

B. Qualified Immunity

Qualified immunity shields government officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). A government agent is entitled to immunity unless his act is "so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

To evaluate claims of qualified immunity, the Court considers whether (1) the plaintiff has alleged a violation of a constitutional right; and (2) whether the right was "clearly established" at the time of the defendant's misconduct. This two-pronged analysis may be done in whatever order is deemed most appropriate for the case. Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 821 (2009).

With this immunity background, we turn to Rehberg's claims.

III. COUNT 6 – MALICIOUS PROSECUTION

Count 6 alleges Defendants Hodges and Paulk violated Rehberg's Fourth and Fourteenth Amendment rights through their "malicious prosecution" of him, resulting in his indictment and arrest.[6] Rehberg alleges that (1) Hodges and Paulk knew there was no probable cause to indict him, and therefore they got together with malice, fabricated evidence (i.e., Paulk's false testimony), and decided to present that fabricated evidence to the grand jury; (2) Paulk, at Hodges's direction, then testified falsely before the grand jury, resulting in Rehberg's indictment and arrest; and (3) Hodges and Paulk invaded Rehberg's privacy by illegally issuing subpoenas to BellSouth, Alltel, and Exact Advertising, without any pending indictment and as a discovery device for private civilians. We first discuss Paulk's false testimony before the grand jury and then the Defendants' pre-indictment conduct and subpoenas.

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[6] Rehberg alleges his arrest was an unreasonable seizure. The Fourth Amendment protection against "unreasonable" searches and seizures was made applicable to the States through the Fourteenth Amendment. Major League Baseball v. Crist, 331 F.3d 1177, 1179 n. 4 (11th Cir. 2003).

A. Paulk's Grand Jury Testimony

Even if Hodges and Paulk knew Paulk's testimony was false, Paulk receives absolute immunity for the act of testifying to the grand jury. Briscoe v. LaHue, 460 U.S. 325, 326, 103 S. Ct. 1108, 1111-12 (1983) (affirming that common-law immunities granted to witnesses in judicial proceedings required giving absolute immunity from § 1983 suit to police officer accused of giving false testimony at trial); Burns, *500 U.S.* at *492*, *111* S. *Ct*. at *1492* (holding prosecutor was absolutely immune for "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing"); Jones, 174 F.3d at 1288 ("[P]rosecutors and witnesses have absolute immunity for claims of conspiracy to commit perjury based on a witness's allegedly false testimony at trial, before a grand jury, or at a post-conviction hearing."); Strength v. Hubert, 854 F.2d 421, 422-24 (11th Cir. 1988) (concluding investigator for state Attorney General's office received absolute immunity for false testimony to a grand jury, at which the defendant investigator was the sole witness);[7] Kelly v. Curtis, 21 F.3d 1544, 1553 (11th Cir. 1994) (holding detective immune for grand jury testimony).

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[7] Overruled on other grounds, Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996).

We recognize that Plaintiff Rehberg alleges Defendant Paulk was the sole "complaining witness" before the grand jury. However, in Jones, "we expressly reject[ed] carving out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." Jones, 174 F.3d at 1287 n. 10; see Rowe, 279 F.3d at 1285 (stating Jones "reject[ed] an exception for the testimony of 'complaining witnesses'"). In Jones, this Court aligned itself with the Third Circuit's decision in Kulwicki v. Dawson, 969 F.2d 1454, 1467 n. 16 (3d Cir. 1992), which rejected the "complaining witness" exception to absolute immunity for false grand jury testimony. Jones, 174 F.3d at 1287 n. 10. The Jones Court reasoned that allowing civil suits for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings:

> [T]his case vividly illustrates the serious problems with carving out such an exception and imposing civil liability for . . . false testimony deceiving the grand jury. To prove or to defend against such a claim would necessitate depositions from the prosecutor, the grand jury witnesses, and the grand jury members . . . [which], in effect, would emasculate both the absolute immunity for grand jury testimony and the confidential nature of grand jury proceedings. The remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages.

Jones, 174 F.3d at 1287 n. 10.[8] And the Supreme Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." United States v. Sells Eng'g, Inc., 463 U.S. 418, 424, 103 S. Ct. 3133, 3138 (1983) (quotation marks omitted). Based on Jones, we reject Rehberg's "complaining witness" exception to absolute immunity for false grand jury testimony.[9]

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[8] In Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999), this Court declined to decide whether to adopt a "complaining witness" exception because there was no factual finding in that case that the defendant Georgia Bureau of Investigation officer was equivalent to a "complaining witness." Id. at 1367 n. 1. So Mastroianni did not answer the question presented here, but Jones did.

[9] Two circuits carved out a complaining-witness exception to absolute immunity for false grand jury testimony. See, e.g., Harris v. Roderick, 126 F.3d 1189, 1199 (9th Cir. 1997) (Deputy U.S. Marshals not absolutely immune for false testimony before a grand and petit jury); White v. Frank, 855 F.2d 956 (2d Cir. 1988) (police officer, as the "complaining witness," was not absolutely immune for false grand jury testimony). These decisions rely on Malley v. Briggs, 475 U.S. at 340, 106 S. Ct. at 1096, which concluded that a police officer did not receive absolute immunity for drawing up "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants. The Supreme Court held similarly in Kalina v. Fletcher, 522 U.S. at 120, 129-31, 118 S. Ct. at 505, 509-10, finding a prosecutor was not absolutely immune for acting as a witness in personally attesting to the truth of averments in a certification affidavit supporting an application for probable cause for an arrest warrant.

Acknowledging White v. Frank relies on Malley, the Jones Court noted that carving out an immunity exception for grand jury testimony would eviscerate the secrecy of grand jury proceedings, a concern not implicated by the "felony complaints"

B. Hodges and Paulk's Pre-Indictment Investigation

Distilled to its essence, Defendants' alleged pre-indictment conduct (excepting the subpoenas) is this: Hodges and Paulk, acting as investigators, got together as a favor to the hospital, with malice and without probable cause, and made up a story about Rehberg, and then Paulk (at Hodges's direction) told that fake story under oath to the grand jury, leading to Rehberg's indictment and arrest. We already determined supra that Paulk receives absolute immunity for the actual grand jury testimony itself. The question before us now is whether absolute immunity applies to the alleged conspiracy decision in the investigative stage to make up and present Paulk's false testimony to the grand jury. Our precedent answers this question too. See Mastroianni, 173 F.3d at 1367; Rowe, 279 F.3d at 1282; Jones, 174 F.3d at 1289.

In Mastroianni, the plaintiff alleged defendant Yeomans, a Georgia Bureau of Investigation agent, "engaged in a pretestimonial conspiracy to present false evidence, for which neither absolute nor qualified immunity is available." Mastroianni, 173 F.3d at 1367. This Court first stressed that "a witness has absolute immunity from civil liability based on his grand jury testimony. See Strength, 854 F.2d at 425, relying on Briscoe v. La Hue, 460 U.S. 325, 103 S. Ct. 1108 [ ] (1983)." Id. The Mastroianni Court then pointed out that while the plaintiff "contend[ed] that Yeomans committed numerous acts in furtherance of a conspiracy to present false testimony before the

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filed to support an arrest warrant in Malley and the personal certification for an arrest warrant in Kalina.

grand jury convened, the record itself support[ed] such an inference only if we consider as evidence Yeomans' testimony as it relates back to Yeomans' pretestimonial acts and statements." Mastroianni, 173 F.3d at 1367. In other words, because the only evidence to show a conspiracy in the pre-indictment phase was Yeomans's later false grand jury testimony, and because Yeomans was immune for that testimony, we concluded that Yeomans was absolutely immune for conspiracy to present or give grand jury testimony. Id. ("Because we may not consider such testimony as a factor upon which to base Yeomans' potential liability, we conclude that Yeomans is entitled to absolute immunity for his actions in this case").

This Court subsequently applied Mastroianni in Jones and Rowe, in each case concluding that absolute immunity applied equally both to the false testimony itself and to the alleged conspiracies to present false testimony. Jones, 174 F.3d at 1289 ("To allow a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front"); Rowe, 279 F.3d at 1282 ("It would be cold comfort for a prosecutor to know that he is absolutely immune from direct liability for actions taken as prosecutor, if those same actions could be used to prove him liable on a conspiracy theory involving conduct for which he was not immune").

Since Paulk receives absolute immunity for his false testimony before the grand jury, Hodges and Paulk are similarly immune for their alleged conspiracy to fabricate and present false testimony to the grand jury. Rowe, 279 F.3d at 1282 ("[A] witness's absolute immunity from liability for testifying forecloses any use of that testimony as evidence of the witness's membership in a conspiracy prior to his taking the stand").

It is important to point out that Hodges and Paulk generally would not receive absolute immunity for fabricating evidence, because investigating and gathering evidence falls outside the prosecutor's role as an advocate. See Buckley, 509 U.S. at 262-64, 113 S. Ct. at 2610-11 (no immunity for prosecutor who fabricated expert testimony linking defendant's boot with bootprint at murder scene); Rowe, 279 F.3d at 1281 (no immunity for fabrication of jump rope); Jones, 174 F.3d at 1289-90 (no immunity for fabrication of bootprint); Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997) (no immunity for police officer's planting of cocaine). All of these cases involved a particular discrete item of physical or expert evidence that was falsely created during the investigative stage to link the accused to a crime.

In contrast, there is no allegation of any physical or expert evidence that Hodges or Paulk fabricated or planted. There is no allegation of a pre-indictment document such as a false affidavit or false certification. Rather, Hodges and Paulk are accused of fabricating together only the testimony Paulk later gave to the grand jury. No evidence existed until Paulk actually testified to the grand jury. Stated differently, the only evidence Rehberg alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity.[10]

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[10] Rehberg does not allege, for instance, that Hodges and Paulk fabricated physical evidence linking him to Dr. Hotz's house or convinced another witness to testify falsely about Re-

For all these reasons, we conclude Hodges and Paulk are entitled to absolute immunity for the pre-indictment conduct of conspiring to make up and present Paulk's false testimony to the grand jury.

C. Subpoenas During Investigation

Rehberg's allegations regarding the subpoenas to his telephone and Internet providers all recount pre-indictment investigative conduct by Hodges and Paulk.[11] A prosecutor loses the cloak of absolute immunity by stepping out of his role as an advocate and performing "investigative" functions more commonly performed by law enforcement officers. Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; Burns, 500 U.S. at 496; Rowe, 279 F.3d at 1280, 111 S. Ct. at 1944-45; Jones, 174 F.3d at 1285. Hodges and Paulk accordingly do not receive absolute immunity for preparing and filing subpoenas during the investigation of Rehberg.

Hodges and Paulk may, however, receive qualified immunity if Rehberg's subpoena allegations either do not state a constitutional violation or do not state a constitutional violation that was clearly established. Pearson, 129 S.Ct. at 815-16, 821-22. Rehberg claims the subpoenas violated his Fourth Amendment right to be free of unreasonable search and seizure.[12]

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hberg's involvement. The only evidence presented to the grand jury was Paulk's testimony and Dr. Hotz's testimony (which Rehberg does not allege was false).

[11] Rehberg's complaint does not allege Defendant Burke participated in the issuance of the subpoenas.

[12] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects,

In order for Fourth Amendment protections to apply, the person invoking the protection must have an objectively reasonable expectation of privacy in the place searched or item seized. Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 473 (1998); Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967). To establish a reasonable expectation of privacy, the person must show (1) that he manifested "a subjective expectation of privacy" in the item searched or seized, and (2) a willingness by society "to recognize that expectation as legitimate." United States v. McKennon, 814 F.2d 1539, 1543 (11th Cir. 1987).

The Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582 (1979). "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624 (1976).

More specifically, a person does not have a legitimate expectation of privacy in numerical information he conveys to a telephone company in the ordinary course of business. Smith, 442 U.S. at 743-44, 99 S. Ct. at 2582 ("[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is

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against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

not one that society is prepared to recognize as reasonable") (quotation marks omitted); accord United States v. Thompson, 936 F.2d 1249, 1250 (11th Cir. 1991) ("The Supreme Court has held that the installation of a pen register does not constitute a search under the Fourth Amendment of the Constitution and does not warrant invocation of the exclusionary rule.").

Here, Rehberg lacked a legitimate expectation of privacy in the phone and fax numbers he dialed. Once he voluntarily provided that information to BellSouth and Alltel (later Sprint), Rehberg lacked any further valid expectation that those third parties would not turn the information over to law enforcement officers. Absent a valid right of privacy, Rehberg cannot state a constitutional violation regarding the subpoenas for his phone and fax information, and Paulk and Hodges accordingly are entitled to qualified immunity for issuing those subpoenas to BellSouth and Alltel.

This case presents a closer question over whether Paulk violated Rehberg's Fourth Amendment rights by issuing a subpoena to Rehberg's Internet Service Provider ("ISP") and obtaining "Mr. Rehberg's personal e-mails that were sent and received from his personal computer." Compl. ¶ 37, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Jan. 23, 2007). This is a question of first impression in this Circuit. Thus, we examine how other circuits have considered privacy rights in email material, such as email addresses, Internet subscriber information, and the contents of emails stored either on an ISP server or on a private computer/server, or both.

Several circuits have concluded that a person lacks legitimate privacy expectations in Internet subscriber information and in to/from addresses in emails sent via ISPs. See, e.g., United States v. Perrine, 518 F.3d 1196, 1204-05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation") (collecting cases from the Fourth, Sixth, and Ninth Circuits and district courts in West Virginia, Massachusetts, Connecticut, Maryland, New York, and Kansas); United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008) ("[E]-mail and Internet users have no expectation of privacy in the to/from addresses of their messages or the IP addresses of the websites they visit because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information.").

To date only a few circuit decisions address the issue of Fourth Amendment protection of email content. Some circuit decisions suggest in dicta that a person loses a legitimate expectation of privacy in emails sent to and received by a third-party recipient. In Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001), the Sixth Circuit noted that Internet bulletin board users lack a valid Fourth Amendment expectation of privacy in materials they voluntarily posted to a public Internet bulletin board. Id. The Sixth Circuit reasoned that a person would lose a legitimate expectation of privacy in a sent email that had already reached its recipient, analogizing an emailer to a letter-writer, whose "'expectation of privacy ordinarily terminates upon delivery'" of a letter. Id. (quoting United States v. King, 55 F.3d 1193, 1196 (6th Cir. 1995)). Ultimately, however, the Sixth Circuit did not resolve this constitutional question because it determined that the plaintiffs had not shown a genuine issue of fact over whether the defendants actually searched their emails, and thus could not show a Fourth Amendment violation even assuming a privacy right had been violated. Id. at 335.[13]

In United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004), the Second Circuit cited Guest and noted that the defendant, who challenged the constitutionality of a probation condition allowing monitoring of his computer, "may not [ ] enjoy [ ] an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient." Id. However, the Second Circuit ultimately noted that as a probationer, the defendant would be subject to a reduced expectation of privacy. The Second Circuit thus did not issue a constitutional holding on the privacy rights of private citizens in email content. Id.

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[13] Plaintiff Rehberg points to Warshak v. United States, 490 F.3d 455 (6th Cir. 2007), reh'g en banc granted, opinion vacated (6th Cir. Oct. 9, 2007) (criminal investigation of plaintiff), in which a Sixth Circuit panel concluded "that individuals maintain a reasonable expectation of privacy in e-mails that are stored with, or sent or received through, a commercial ISP." Id. at 473. In reaching this conclusion, the Sixth Circuit panel distinguished its circuit precedent in Guest: "Although we stated that an e-mail sender would 'lose a legitimate expectation of privacy in an e-mail that had already reached its recipient,' analogizing such an e-mailer to 'a letter-writer,' this diminished privacy is only relevant with respect to the recipient, as the sender has assumed the risk of disclosure by or through the recipient. [Guest, 255 F.3d] at 333. Guest did not hold that the mere use of an intermediary such as an ISP to send and receive e-mails amounted to a waiver of a legitimate expectation of privacy." Id. at 472. The Sixth Circuit en banc subsequently vacated the Warshak opinion because the criminal investigation was over, there was no ongoing possibility of a Fourth Amendment violation, and thus the case was not ripe. Warshak v. United States, 532 F.3d 521 (6th Cir. 2008).

The Supreme Court has not yet addressed the question of privacy rights in email material. Plaintiff Rehberg thus relies on Supreme Court precedent on privacy rights accorded to the contents of telephone communications. In Katz, the Supreme Court first recognized a privacy expectation in the contents of a telephone conversation in a closed public phone booth. Katz, 389 U.S. at 353, 88 S. Ct. at 512. In Smith v. Maryland, the Supreme Court refined that privacy expectation, noting the distinction between the contents of a telephone call (for which a legitimate privacy expectation exists) and the actual phone numbers dialed (no privacy expectation). 442 U.S. at 743-44, 99 S. Ct. at 2582.

The Supreme Court's more-recent precedent shows a marked lack of clarity in what privacy expectations as to content of electronic communications are reasonable. In City of Ontario v. Quon, No. 08-1332, slip. op., 78 U.S.L.W. 4591 (U.S. June 17, 2010), the Supreme Court reversed the Ninth Circuit's decision that held a government employee had a reasonable expectation of privacy in text messages sent and received by a third party. The plaintiff police sergeant sued the City for violating his Fourth Amendment rights by obtaining and reviewing transcripts of personal text messages he sent and received from a pager that was owned by the City and issued to him for work use. Id. at 1, 5. The parties disputed whether the plaintiff, as a public employee, had an objectively reasonable expectation of privacy in those text messages. Id. at 9-10.

Even after the briefs of 2 parties and 10 amici curiae, the Supreme Court declined to decide whether the plaintiff's asserted privacy expectations were reasonable. Id. at 9, 11-12. The Supreme Court acknowledged that the case "touches issues of far-reaching significance." Id. at 1. After remarking that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer," the Supreme Court cautioned that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Id. at 10. The Supreme Court explained: "In Katz, the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth." Id. In contrast, the Supreme Court found "[i]t is not so clear that courts at present are on so sure a ground" as to electronic devices. Id. Therefore, the Supreme Court admonished that "[p]rudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations" in communications on electronic devices. Id. The Supreme Court specifically noted that ongoing "[r]apid changes in the dynamics of communication and information transmission" caused similar rapid change "in what society accepts as proper behavior." Id. at 11.

To underscore its disinclination to establish broad precedents as to privacy rights vis-a-vis electronic devices and emerging technologies, the Supreme Court explained the difficulty in determining what privacy expectations are reasonable, stating:

> [T]he Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone

> and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.

Id. at 11. The Supreme Court again eschewed "a broad holding," finding it "preferable to dispose of this case on narrower grounds" and "settled principles." Id. at 1, 11-12. It declined to answer the constitutional question of whether the plaintiff's privacy expectation was reasonable or even to set forth the governing principles to answer that question. Instead, the Supreme Court (1) assumed arguendo that plaintiff Quon had a reasonable expectation of privacy, (2) assumed that the government's review of a transcript of his text messages was a search under the Fourth Amendment, and even (3) assumed principles governing a search of a physical office applied to "the electronic sphere." Id. 12. It then concluded that the plaintiff's government employer did not violate the Fourth Amendment because its review of his personal text messages on a government-owned pager was reasonable and motivated by a legitimate work-related purpose. Id. at 12, 16-17 (citing

O'Connor v. Ortega, 480 U.S. 709, 725, 107 S. Ct. 1492, 1502 (1987)).

As these varied cases suggest, the questions of whether Fourth Amendment principles governing a search of Rehberg's home also should apply to subpoenas sent to a third-party ISP for electronic data stored on the third-party's server, and whether Rehberg had a reasonable privacy expectation in the contents of his personal emails sent voluntarily through that third-party ISP, are complex, difficult, and "far-reaching" legal issues that we should be cautious about resolving too broadly. As the Supreme Court advised us, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Id. at 10. Given the lack of precedent, we now question whether it would be prudent in this case and on this limited factual record to establish broad precedent as to the reasonable privacy expectation in email content. Moreover, because this is a qualified immunity case, we need not reach the underlying constitutional issue. Instead, we can resolve this case narrowly, cf. id. at 1, because at a minimum Rehberg has not shown his alleged constitutional right was clearly established.[14]

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[14] In his petition for panel rehearing, Rehberg also tangentially mentions the Stored Communications Act ("SCA"), 18 U.S.C. § 2703, et seq., which provides the government a mechanism to require the provider of a remote computing service to disclose the contents of wire or electronic communications upon issuance of a warrant or court order. Pet. for Reh'g at 4 n.2, 10. Rehberg seemingly argues that a violation of this Act implies a violation of his constitutional rights. However, Rehberg did not assert an SCA claim in the district court or in his appellate brief, so we decline to address it further. Tanner Adver. Group,

In determining whether a constitutional right was clearly established at the time of violation, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 202, 121 S. Ct. 2151, 2156 (2001); see also Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516 (2002) ("the salient question . . . is whether the state of the law [at the time of violation] . . . gave [the defendants] fair warning that their alleged treatment of [the plaintiff] was unconstitutional").[15]

No Supreme Court decision and no precedential decision of this Circuit defines privacy rights in email content voluntarily transmitted over the global

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L.L.C. v. Fayette County, 451 F.3d 777, 785 (11th Cir. 2006) ("'The law is by now well settled in this Circuit that a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed.'" (quoting Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004)) (brackets omitted)); see also Snow v. DirecTV, Inc., 450 F.3d 1314, 1321 (11th Cir. 2006) ("a valid civil complaint under the SCA must allege a violation of one of its provisions").

[15] This fair and clear notice requirement may be met in three ways: (1) the words of the pertinent federal statute or constitutional provision may be so specific as to clearly establish the law even in total absence of judicial decisions interpreting the law, Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002); (2) "some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts," id. at 1351; and (3) most commonly, when we lack explicit statutory or constitutional pronouncements and broad case holdings, we look to precedential cases that are tied to their particular facts. Id. at 1351-52. When caselaw is needed, we look to decisions of the U.S. Supreme Court, this Court, and, where applicable, the highest court of the pertinent state. Marsh v. Butler County, Ala., 268 F.3d 1014, 1032-33 n. 10 (11th Cir. 2001).

Internet and stored at a third-party ISP. See Quon, slip op. at 9-10. As a result, Paulk could not have known the scope of the privacy rights, if any, that Rehberg had in email content stored at his third-party ISP.[16] The Supreme Court's decisions in Katz and Smith clearly established an objectively reasonable privacy right in telephone conversation content, but, as the modern Internet did not exist at the time of those decisions, whether the analytical framework, much less the rationale, of those decisions transfers to privacy rights in Internet email is questionable and far from clearly established. Indeed, in Quon, the Supreme Court only assumed, without deciding, that the Fourth Amendment framework for analyzing physical searches applied to searches in the "electronic sphere." Id. at 12. In contrast, Rehberg has not identified any judicial decision holding a government agent liable for Fourth Amendment violations related to email content received by a third party and stored on a third party's server.

Because the federal law was not clearly established, the district court erred in denying qualified immunity to Paulk on Rehberg's email subpoena claim.[17]

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[16] There is no allegation, for instance, that the Defendants searched Rehberg's home computer or even his entire email account. The Complaint alleges only that Paulk subpoenaed and accessed email messages actually sent and received through Rehberg's ISP. An email draft never sent by Rehberg to his ISP would not have been within the scope of the subpoena.

[17] *Rehberg's Section 1983 malicious prosecution claim in* Count 6 requires proving both (1) the elements of the common-law tort of malicious prosecution; and (2) a violation of his Fourth Amendment right to be free from unreasonable seizures. Kingsland v. City of Miami, 382 F.3d 1220, 1234 (11th Cir.

IV. COUNT 7 – RETALIATORY PROSECUTION

In Count 7, Rehberg alleges Hodges and Paulk violated his First Amendment free speech rights by retaliating against him for his criticism of the hospital in his faxes. Rehberg alleges Hodges's and Paulk's decisions to investigate him, issue subpoenas, provide his information to paid civilians, and procure wrongful indictments were in retaliation for his faxes and criticism of the hospital and were all made without probable cause.[18]

We first review Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695 (2006), which addresses retaliatory-prosecution claims.

A. Hartman v. Moore

2004); Wood v. Kealey, 323 F.3d 872, 881 (11th Cir. 2003). Rehberg alleges his arrest was an unlawful seizure, but he also appears to contend that the unlawful search of his phone records and emails also would support a malicious prosecution claim. We cannot locate any case where a search without a later arrest was sufficient to support a Section 1983 malicious prosecution claim. However, because Rehberg has not shown the search of his phone records and emails violated clearly established federal law, we need not address the viability of Rehberg's malicious prosecution claims as to the subpoenas. Alternatively, if Rehberg is attempting to assert only an independent Fourth Amendment claim (and not a malicious prosecution claim) as to the subpoenas, Rehberg also has not shown the violation of clearly established federal law.

[18] To the extent Rehberg relies on the Fourth Amendment, "there is no retaliation claim under the Fourth Amendment separate and distinct from [Rehberg's] malicious prosecution . . . claim[ ]." Wood, 323 F.3d at 883. "Instead, the only cause of action for retaliation that arguably applies here is retaliatory prosecution in violation of the First Amendment." Id.

In Hartman, plaintiff Moore brought a Bivens[19] action against postal inspectors and a federal prosecutor for retaliatory prosecution.[20] Because of Moore's criticism of and lobbying to the U.S. Postal Service, postal inspectors launched criminal investigations against Moore and pressured the United States Attorney's Office to indict him, "[n]otwithstanding very limited evidence." Id. at 253-54, 126 S. Ct. at 1699-1700. Although they did not testify, the postal inspectors drafted "witness statements" for other witnesses and provided them to the prosecutor, who presented them to the grand jury. Moore v. United States, 213 F.3d 705, 707 (D.C. Cir. 2000). The district court dismissed the criminal charges against Moore for a "complete lack of direct evidence." Hartman, 547 U.S. at 254, 126 S. Ct. at 1700.

In Moore's subsequent Bivens action for retaliatory prosecution, the district court granted absolute immunity to the prosecutor but denied qualified immunity to the postal inspectors. Id. at 255, 126 S. Ct. at 1701. As to the prosecutor, the D.C. Circuit affirmed absolute immunity for the retaliatory decision to prosecute Moore and the prosecutor's concealment of exculpatory evidence from the grand jury, manipulation of evidence before the grand jury, and failure to disclose exculpatory material before trial. Moore, 213 F.3d at 708. As to the postal inspectors, the D.C.

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[19] See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971).

[20] Moore's company manufactured a multiline optical character reader useful in sorting mail. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. He lobbied the U.S. Postal Service to purchase multiline readers and criticized its reliance on single-line readers. Id. at 253, 126 S. Ct. at 1699.

Circuit affirmed the denial of qualified immunity and allowed Moore's retaliatory-prosecution claim to proceed against them, even though Moore had not shown an absence of probable cause for the criminal charges against him.

In reversing the D.C. Circuit's denial of qualified immunity to the postal inspectors, the Supreme Court in Hartman concluded that to bring a retaliatory-prosecution claim, the plaintiff must show an absence of probable cause for the prosecution. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. The Supreme Court first noted, "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Id. at 256, 126 S. Ct. at 1701 (citations and quotation marks omitted). The Supreme Court, however, explained that a retaliatory-prosecution suit cannot be brought against the prosecutor, but only against the "non-prosecuting official" who successfully induced the prosecutor to bring charges that would not otherwise have been brought, as follows:

> A Bivens (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff like Moore must show that the nonprosecuting official acted in retalia-

> tion, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Id. at 261-62, 126 S. Ct. at 1704-05 (emphasis added). To sue for retaliatory prosecution, a plaintiff must establish a "but-for" causal connection between the retaliatory animus of the non-prosecutor and the prosecutor's decision to prosecute. See id. at 256, 261, 126 S. Ct. at 1701, 1704 (discussing "but-for cause" and "but-for basis" for the prosecutor's decision to prosecute).[21]

And Hartman indicates that to establish a prima facie case of this but-for causal connection, a plaintiff must plead and prove both (1) a retaliatory motive on the part of the non-prosecutor official, and (2) the absence of probable cause supporting the prosecutor's decision. Id. at 265; see also Wood, 323 F.3d at 883 (First Amendment retaliatory-prosecution claim is defeated by the existence of probable cause). A retaliatory motive on the part of a "non-prosecuting official" combined with an absence of probable cause will create "a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge." Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. Importantly, the absence of probable cause "is not necessarily dispositive" of whether the unconstitutionally motivated inducement succeeded, but will create a prima facie inference that it did. Id. The burden then shifts to the defendant official to show "that the action would have been taken anyway, independently of any retaliatory animus." Id. at 261, 126 S. Ct. at 1704. In other words, the defendant official will not be liable if he can show the prosecutor would have taken the action complained of anyway. Id.

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[21] In a footnote, the Supreme Court noted that Moore's complaint charged the prosecutor with acting in both an investigatory and prosecutorial capacity, but that no appeal or claim against the prosecutor was before the Supreme Court. Hartman, 547 U.S. at 262 n.8, 126 S. Ct. at 1705 n.8.

B. Rehberg's Retaliatory-Prosecution Claims

Hartman dictates the outcome of Rehberg's retaliatory-prosecution claim in Count 7. First, as to Hodges, Rehberg alleges Hodges was in communication with Burke about the decision to prosecute, even after Hodges recused. Hodges's alleged decision to prosecute Rehberg, even if made without probable cause and even if caused solely by Paulk's and his unconstitutional retaliatory animus, is protected by absolute immunity. Hartman, 547 U.S. at 261-62, 126 S. Ct. at 1704-05.

As to Paulk, Rehberg must show investigator Paulk's retaliation against Rehberg successfully induced the prosecution and was the "but-for" cause of the prosecution. Hartman, 547 U.S. at 265, 126 S. Ct. at 1701. Accordingly, Rehberg must show that prosecutor Burke (himself or with Hodges's influence) would not have prosecuted Rehberg but for Paulk's retaliatory motive and conduct.[22]

The very detailed allegations in Rehberg's complaint satisfy the two requirements for a prima facie case of retaliatory prosecution: non-prosecutor Paulk's retaliatory motive, and the absence of probable cause for prosecutor Burke to bring charges. Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. For example, Rehberg alleges "[t]here was no probable cause for the underlying criminal charges against Mr. Rehberg and such charges would not have been brought if there was no retaliatory motive." Rehberg supports this alleged lack of probable cause by alleging Paulk admitted that "he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary," and Paulk's false testimony was the only evidence Burke presented in support of the first indictment. Without Paulk's allegedly false testimony, Burke could not have procured the first indictment because there was no other evidence. Rehberg also alleges Hodges and Paulk acted in retaliation for Rehberg's criticisms of the activities and financial management of a public hospital to which they had close political connections and personal relationships and that chilling Rehberg's speech was a motivating factor in all of Hodges's and Paulk's conduct in investigating and prosecuting him.

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[22] Count 7 of Rehberg's complaint does not name Burke as a defendant, but Count 7 claims Paulk's retaliatory motive and actions "wrongfully influenced and instigated the prosecutorial decision to bring charges against Mr. Rehberg."

In sum, Rehberg sufficiently has alleged the requisite retaliatory motive, absence of probable cause, and but-for causation (i.e., that Burke would not have prosecuted Rehberg but for Paulk's false testimony). Therefore, at this pleading juncture, the district court did not err in denying absolute and qualified immunity to Defendant Paulk on Rehberg's retaliatory-prosecution claim.

C. Retaliatory Investigation Claim

Rehberg's complaint also alleges a "retaliatory investigation" claim against Hodges and Paulk. For example, Rehberg's complaint alleges Hodges and Paulk together decided to investigate Rehberg and took several steps during the investigation because each of them had retaliatory animus. These allegations of coordinated and joint actions are replete throughout the complaint. E.g., Compl. ¶¶ 99 ("Mr. Paulk and Mr. Hodges instituted an investigation . . ."), 124 ("Chilling his political speech was a substantial or motivating factor in the wrongful conduct of Mr. Paulk and Mr. Hodges in investigating Mr. Rehberg . . ."), 157-61 (conspiracy claim).

Hartman does not help us with this claim because the Supreme Court pointedly did not decide whether "simply conducting retaliatory investigation with a view to promote prosecution is a constitutional tort." Hartman, 547 U.S. at 262 n. 9, 126 S. Ct. at 1705 n. 9 ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us").[23]

As noted above, only qualified immunity, not absolute immunity, applies to conduct taken in an investigatory capacity as opposed to a prosecutorial capacity. As we explain above, it was not clearly established that the subpoenas to Rehberg's phone and email providers violated his Fourth Amendment rights. We also are inclined to agree with the government that Hodges and Paulk's retaliatory animus does not create a distinct constitutional tort.[24]

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[23] Rehberg does not allege he incurred any expenses in the investigation stage.

[24] The initiation of a criminal investigation in and of itself does not implicate a federal constitutional right. The Constitution does not require evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the government can begin investigating that suspect. See United States v. Aibejeris,

But even if we assume Rehberg has stated a constitutional violation by alleging that Hodges and Paulk initiated an investigation and issued subpoenas in retaliation for Rehberg's exercise of First Amendment rights, Hodges and Paulk still receive qualified immunity because Rehberg's right to be free from a retaliatory investigation is not clearly established. The Supreme Court has never defined retaliatory investigation, standing alone, as a constitutional tort, Hartman, 547 U.S. at 262 n. 9, and neither has this Court. Without this sort of precedent, Rehberg cannot show that the retaliatory investigation alleged here violated his First Amendment rights. See Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir. 2009) ("In order to determine whether a right is clearly established, we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances"). Hodges and Paulk accordingly are entitled to qualified immunity for Rehberg's retaliatory investigation claims in Count 7.

V. COUNT 8 – FABRICATION OF EVIDENCE AND PRESS STATEMENTS AGAINST BURKE

Count 8 is against only Burke. Rehberg alleges Burke violated his "constitutional rights" by (1) "participat[ing] in fabricating evidence"; (2) presenting Paulk's perjured testimony to the grand jury; and (3)

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28 F.3d 97, 99 (11th Cir. 1994). No Section 1983 liability can attach merely because the government initiated a criminal investigation.

making defamatory statements to the media which "damaged Mr. Rehberg's reputation."[25]

As a special prosecutor appointed to stand in for Hodges, Burke receives the full scope of absolute prosecutorial immunity and is absolutely immune for Rehberg's claims of malicious prosecution and the presentation of perjured testimony to a grand jury. For the same reasons explained above, Burke also is absolutely immune for participating in the conspiracy to fabricate Paulk's grand jury testimony against Rehberg.

Burke's statements to the media, however, are not cloaked in absolute immunity because "[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor," and they are not part of the prosecutor's role as an advocate of the State. See Buckley, 509 U.S. at 277-78, 113 S. Ct. at 2618 ("The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions"); Hart v. Hodges, 587 F.3d 1288, 1297 (11th Cir. 2009). Burke's immunity for the alleged press statements must arise, if at all, through qualified immunity.

A tort claim, such as Rehberg's defamation allegation in Count 8, does not give rise to a § 1983 due process claim unless there is an additional constitutional injury alleged. Cypress Ins. Co. v. Clark, 144 F.3d 1435, 1438 (11th Cir. 1998). "The Supreme Court . . . held that injury to reputation, by itself, does not constitute the deprivation of a liberty or property interest protected under the Fourteenth Amendment." Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005) (citing Paul v. Davis, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 1160-61 (1976)).[26] Damages to a plaintiff's reputation "are only recoverable in a section 1983 action if those damages were incurred as a result of government action significantly altering the plaintiff's constitutionally recognized legal rights." Cypress, 144 F.3d at 1438.

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[25] Burke is not alleged to have participated in subpoenaing Rehberg's telephone and Internet providers.

This doctrine is known as the "stigma-plus" test, Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1302 (11th Cir. 2001), and requires the plaintiff to show both a valid defamation claim (the stigma) and "the violation of some more tangible interest" (the plus). Behrens, 422 F.3d at 1260 (quotation marks omitted). "To establish a liberty interest sufficient to implicate the fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with . . . [a] government official's conduct [that] deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation." Id. (citations and quotation marks omitted).[27] The "stigma-plus" test requires not only allegations stating a common-law defamation claim, but also an additional constitutional injury, tied to a previously recognized constitutional property or liberty interest, flowing from the defamation. Cypress, 144 F.3d at 1436-37.

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[26] Rehberg does not specifically identify what constitutional provision Burke's media statements violated. We assume Rehberg asserts a Fourteenth Amendment due process claim. See, e.g., Paul, 424 U.S. at 712, 96 S. Ct. at 1165-66; Cypress, 144 F.3d at 1436. Rehberg does not identify another constitutional theory that might support a Section 1983 action for false statements to the media.

[27] "While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as

Rehberg's complaint alleges damage to his reputation but does not allege the required deprivation of any previously recognized constitutional property or liberty interest. The only factual allegations Rehberg makes regarding Burke's media statements are these: "Mr. Rehberg . . . was subjected to extensive publicity in the media where he was identified as being charged with multiple felonies and misdemeanors, and publicly identified by the acting District Attorney as having committed an assault and burglary. The damage of three indictments on his public record will remain with him and his wife and children for the rest of their lives." He continues by alleging, "[t]hese wrongful indictments will always be associated with his name and have caused and will cause significant personal, professional and economic damages to Mr. Rehberg." Rehberg alleges Burke's media statements "wrongfully damaged [his] reputation."

In short, Rehberg's defamation allegations are too generalized to show a previously recognized con-

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employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul, 424 U.S. at 701; see also Siegert v. Gilley, 500 U.S. 226, 234, 111 S. Ct. 1789, 1794 (1991) ("Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action.").

stitutional deprivation flowing from Burke's alleged defamatory statements. Damage to reputation alone is insufficient to state a Fourteenth Amendment due process claim. Cypress, 144 F.3d at 1437-38 ("Indeed, [in Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789 (1991)] the [Supreme] Court specifically rejected the notion that defamation by a government actor that causes injury to professional reputation violates procedural due process").

The district court averted this settled law by connecting Burke's media statements to "the alleged Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges." This was error. The "stigma-plus" test requires the plaintiff to show deprivation of a previously recognized Fourteenth Amendment property or liberty interest "in connection with" the claimed defamation. Even liberally construed, Rehberg's complaint does not allege a procedural due process claim under the Fourteenth Amendment. See Albright v. Oliver, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). Rehberg does not allege Dougherty County or the individual defendants denied him the constitutionally required procedures necessary to challenge his indictments and arrest. Indeed, Rehberg's successful challenges to the three indictments show otherwise. And, under the Fourteenth Amendment, there is no substantive due process right to be free from malicious prosecution without probable cause. Id. at 274, 114 S. Ct. at 813. A malicious prosecution claim arises under the Fourth Amendment, not Fourteenth Amendment substantive due process.

Therefore, the only remaining "plus" Rehberg identifies is the right to be free from malicious prosecution and unreasonable detention under the Fourth Amendment. However, Rehberg's complaint does not allege that Burke's media statements caused Rehberg's indictments and arrest.[28] For example, there is no allegation that the grand jury relied on Burke's press statements in indicting Rehberg or that the Defendants relied on Burke's media statements as probable cause to arrest Rehberg. Paul's "stigma-plus" test is not satisfied by simply alleging a constitutional violation somewhere in the case. The constitutional violation must itself flow from the alleged defamation.[29]

In any event, Rehberg cannot use the prosecution itself (the indictment and arrest) as the basis for constitutional injury supporting a § 1983 defamation claim. The Seventh Circuit considered this precise situation, concluding the plaintiff must point to some constitutional wrong, other than the indictment and related events, in order to support a § 1983 constitutional claim based on defamation. "Identifying the arrest and imprisonment as the loss of liberty does not assist [the plaintiff], however, because [the prosecutor] has absolute immunity from damages for these events." Buckley v. Fitzsimmons, 20 F.3d 789, 797 (7th Cir. 1994), cert. denied, 513 U.S. 1085, 115 S. Ct. 740 (1995) (rejecting plaintiff's arrest as a sufficient "plus" under the stigma-plus test). The Seventh Circuit explained that, "the Supreme Court [ ] adopt[ed] a strict separation between the prosecutor's role as advocate and the ancillary events (such as press conferences) surrounding the prosecution. It would be incongruous to treat the press conference and the prosecution as distinct for purposes of immunity but not for purposes of defining the actionable wrong." Id. at 797-98. The Seventh Circuit concluded that, "a plaintiff who uses a 'stigma plus' approach to avoid Paul and Siegert must identify a 'plus' other than the indictment, trial, and related events for which the defendants possess absolute prosecutorial immunity." Id. at 798.

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[28] The complaint does not clearly state whether Burke made his media statements before Rehberg was indicted or after, but the complaint also does not allege any fact showing that Burke's media statements caused Rehberg to be indicted.

[29] The district court cited Riley v. City of Montgomery, Ala., 104 F.3d at 1253, for the proposition that fabricating evidence violates an accused's constitutional rights, and thus since Rehberg alleges fabrication in this case, he satisfied Paul's "stigma-plus" test. Even assuming evidence was fabricated and that this fabrication was a constitutional violation, nothing in the complaint connects Hodges's and Paulk's alleged evidence fabrication to Burke's press statements.

Therefore Rehberg failed to satisfy Paul's "stigma-plus" test and fails to allege a constitutional claim based on the press statements. This lack of a constitutional claim means Burke receives qualified immunity for his press statements. The district court erred by not finding Burke immune for the allegations in Count 8.

VI. COUNT 10 – CONSPIRACY

Count 10 alleges Hodges, Burke, and Paulk engaged in a conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth Amendments.

"A person may not be prosecuted for conspiring to commit an act that he may perform with impunity." Jones, 174 F.3d at 1289 (citations omitted). A prosecutor cannot be liable for "conspiracy" to violate a defendant's constitutional rights by prosecuting him if the prosecutor also is immune from liability for actually prosecuting the defendant. Rowe, 279 F.3d at 1282. And a witness's absolute immunity for testifying prevents any use of that testimony as evidence of the witness's membership in an unconstitutional conspiracy prior to his testimony. Id.; Mastroianni, 173 F.3d at 1367.

Rehberg's conspiracy allegations do not enlarge what he alleged previously in his complaint. This opinion has already explained why Hodges, Burke, and Paulk receive absolute or qualified immunity for all of the conduct alleged in Counts 6 and 8 and why Hodges receives absolute immunity for the retaliatory prosecution in Count 7. Rehberg cannot state a valid conspiracy claim by alleging the Defendants conspired to do things they already are immune from doing directly.

The only portion of Count 7 that remains is Rehberg's retaliatory prosecution claim against Paulk alone. The intracorporate conspiracy doctrine bars conspiracy claims against corporate or government actors accused of conspiring together within an organization, preventing Rehberg's claim that Paulk "conspired" to initiate a retaliatory prosecution. Dickerson v. Alachua County Commission, 200 F.3d 761, 767 (11th Cir. 2000) ("[I]t is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself"); Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001) (applying intracorporate conspiracy doctrine to city, city fire chief, and city manager). Rehberg has not alleged that Paulk conspired with anyone outside of the District Attorney's office. See Denney, 247 F.3d at 1191 ("the only two conspirators identified . . . are both City employees; no outsiders are alleged to be involved"). The "conspiracy" occurred only within a government entity, and thus the intracorporate conspiracy doctrine bars Count 10 against Paulk. The district court erred in not dismissing Count 10.

VII. CONCLUSION

For the reasons explained above, Hodges and Paulk receive absolute immunity for Paulk's grand jury testimony and for the related pre-indictment conspiracy conduct alleged in Count 6; Hodges and Paulk receive qualified immunity for the issuance of subpoenas alleged in Count 6; Hodges receives absolute immunity for initiating a retaliatory prosecution as alleged in Count 7; Hodges and Paulk both receive qualified immunity for the retaliatory investigation alleged in Count 7; Burke receives absolute immunity for the allegations in Count 8, except for the alleged media statements, for which he receives qualified immunity; and Count 10's conspiracy claim fails. The only surviving claim from this appeal is the retaliatory-prosecution claim in Count 7 against Paulk, for which the district court correctly denied absolute and qualified immunity. We reverse the district court's order in part and remand this case for the district court to grant the Defendants' motions to dismiss and to enter judgment in favor of all Defendants on Counts 6, 7, 8, and 10, except for the retaliatory-prosecution claim against Paulk in Count 7.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

Filed March 11, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-11897

D. C. Docket No. 07-00022-CV-WLS-1

CHARLES A. REHBERG,

Plaintiff-Appellee,

versus

JAMES P. PAULK,
in his individual capacity,
KENNETH B. HODGES, III,
in his individual capacity and
in his official capacity as District
Attorney of Dougherty County
KELLY R. BURKE, in his
individual capacity,

Defendants-Appellants,

DOUGHERTY COUNTY,

Defendant.

Appeal from the United States District Court
for the Middle District of Georgia

(March 11, 2010)

Before CARNES, HULL and ANDERSON, Circuit Judges.

HULL, Circuit Judge:

In this § 1983 action, Plaintiff Charles Rehberg sued former District Attorney Kenneth Hodges, specially appointed prosecutor Kelly Burke, and Chief Investigator James Paulk, alleging federal claims for malicious prosecution, retaliatory investigation and prosecution, evidence fabrication, and conspiracy to violate Rehberg's constitutional rights. Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denial of absolute and qualified immunities. After review and oral argument, we affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

We review Rehberg's version of the events as alleged in his complaint, accepting them as true.[1]

A. The Investigation

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[1] In reviewing a Rule 12(b)(6) motion to dismiss, we accept as true the factual allegations in the complaint and all reasonable inferences therefrom. Jackson v. Okaloosa County, Fla., 21 F.3d 1531, 1534 (11th Cir. 1994).

From September 2003 to March 2004, Plaintiff Rehberg sent anonymous faxes to the management of Phoebe Putney Memorial Hospital (the "hospital"). The faxes criticized and parodied the management and activities of the hospital.

Defendant Hodges, then the District Attorney of Dougherty County, Georgia, and Defendant Paulk, the Chief Investigator in the District Attorney's Office, investigated Rehberg's actions as a "favor" to the hospital, to which Hodges and Paulk are alleged to have political connections. Rehberg alleges Hodges and Paulk lacked probable cause to initiate a criminal investigation of him.

From October 2003 to February 2004, Defendants Hodges and Paulk prepared a series of subpoenas on Hodges's letterhead and issued the subpoenas to BellSouth and Alltel (later Sprint), requesting Rehberg's telephone records, and to Exact Advertising, an Internet service provider, requesting Rehberg's email records. Although no grand jury was impaneled at the time, the subpoenas purported to require appearance before a Dougherty County grand jury. Rehberg's case was not presented to a grand jury until December 14, 2005.

Defendant Paulk gave the results of the subpoenas, consisting of Rehberg's personal emails and phone records, to private civilian investigators, who had directed the substance of the subpoenas. These civilian investigators paid the District Attorney's Office for Rehberg's information, often making payments directly to BellSouth and the other subpoenaed parties, allegedly to pay debts of the District Attorney's Office.

After receiving unfavorable press coverage of his relationships with the hospital, Hodges recused himself from prosecuting Rehberg. Burke was appointed a special prosecutor in Hodges's place. Hodges continued to supervise Paulk and remained in communication with Burke throughout the investigation, but he "never served as the actual prosecutor of the charges against Mr. Rehberg before the Grand Jury."

B. First Indictment

On December 14, 2005, a grand jury indicted Rehberg on charges of aggravated assault, burglary, and six counts of "harassing phone calls." Burke was the prosecutor, and Paulk was the sole complaining witness against Rehberg before the grand jury. The first indictment alleged Rehberg assaulted Dr. James Hotz after unlawfully entering Dr. Hotz's home. In fact, Rehberg has never been to Dr. Hotz's home, and Dr. Hotz never reported an assault or burglary to law enforcement agencies. Paulk later admitted that he never interviewed any witnesses or gathered evidence indicating Rehberg committed an aggravated assault or burglary. And the alleged "harassing" phone calls to Dr. Hotz all were related to the faxes Rehberg had already sent criticizing the hospital.

The City of Albany Police Department[2] did not participate in the investigation. Paulk stated that he and Hodges initiated and handled the investigation because they lacked confidence in the police department's ability to handle the investigation on its own.

Rehberg contested the legal sufficiency of the first indictment. On February 2, 2006, Defendant

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[2] The City of Albany, Georgia, is in Dougherty County.

Burke dismissed and nol-prossed the first indictment.

C. Second Indictment

On February 15, 2006, Defendants Burke and Paulk initiated charges before a second grand jury. Paulk and Dr. Hotz appeared as witnesses. The grand jury issued a second indictment, charging Rehberg with simple assault against Dr. Hotz on August 22, 2004 and five counts of harassing phone calls.

Rehberg contested the sufficiency of the second indictment too. Rehberg alleged he was "nowhere near Dr. Hotz on August 22, 2004," and "[t]here was no evidence whatsoever that Mr. Rehberg committed an assault on anybody as he was charged." At a pretrial hearing on April 10, 2006, Defendant Burke announced the second indictment would be dismissed, but Burke did not dismiss it. On July 7, 2006, the state trial court ordered it dismissed.

D. Third Indictment

On March 1, 2006, Defendants Burke and Paulk appeared before a third grand jury and secured a third indictment against Rehberg, charging him with simple assault and harassing telephone calls. At some unspecified time, Rehberg was arrested and briefly detained pursuant to an arrest warrant issued as a result of the second and third indictments.

On May 1, 2006, the state trial court issued two orders dismissing all charges against Rehberg because the third indictment did not sufficiently charge Rehberg with a criminal offense.

The three indictments against Rehberg were widely reported in the local press. Defendant Burke conducted interviews with the press and issued statements saying: (1) "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them," and (2) "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming."

E. District Court Proceedings

Plaintiff Rehberg filed a verified complaint against Defendants Hodges, Burke, and Paulk, in their individual capacities. Rehberg's complaint alleges ten counts, including these four federal § 1983 claims at issue in this appeal:[3] (1) malicious prosecution against Hodges and Paulk, in violation of Rehberg's Fourth and Fourteenth Amendment rights (Count 6); (2) retaliatory investigation and prosecution against Hodges and Paulk, for their alleged retaliation against Rehberg because he exercised First Amendment free speech rights (Count 7); (3) participation in evidence fabrication, calling Paulk to give false testimony to the grand jury, and giving false statements to the media against Burke only (Count 8); and (4) conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth

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[3] Rehberg's complaint also alleges state law claims for negligence (Counts 1 & 2) and invasion of privacy (Counts 3 & 4) against Paulk, which the district court refused to dismiss. At this juncture, Defendant Paulk has not appealed the district court's rulings on those state law claims. At oral argument, counsel for Defendant Paulk confirmed to the Court that the state law claims in Counts 1, 2, 3, and 4 against Paulk were not on appeal.

Amendments, against Hodges, Burke, and Paulk (Count 10).[4]

Defendants Hodges, Burke, and Paulk moved to dismiss these counts pursuant to Federal Rule of Civil Procedure 12(b)(6). They claimed absolute immunity, and, alternatively, qualified immunity. The district court denied the Defendants' motions.

Defendants Hodges, Burke, and Paulk, in their individual capacities, appeal the district court's denials of immunity as to Rehberg's above four federal constitutional claims.[5] We discuss absolute and qualified immunity and then Rehberg's claims.

II. IMMUNITY LAW

A. Absolute Immunity

Traditional common-law immunities for prosecutors apply to civil cases brought under § 1983. Imbler

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[4] Plaintiff Rehberg also sued Dougherty County and Hodges, in his official capacity. Rehberg withdrew Count 5 against Dougherty County in response to its claim of sovereign immunity. Rehberg has not appealed the district court's dismissal of Count 9 against Dougherty County, which effectively dismissed Count 9 against Hodges because an official capacity claim against Hodges is another moniker for a claim against Dougherty County, Hodges's employer. See Brown v. Neumann, 188 F.3d 1289, 1290 (11th Cir. 1999). Thus only Counts 6, 7, 8, and 10 are involved in this appeal.

[5] The denial of absolute or qualified immunity on a motion to dismiss is an appealable interlocutory order. See Jones v. Cannon, 174 F.3d 1271, 1280-81 (11th Cir. 1999); Maggio v. Sipple, 211 F.3d 1346, 1350 (11th Cir. 2000) (citing Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817-18 (1985)). We review de novo the district court's denial of a motion to dismiss on the basis of immunity and for failure to state a constitutional violation. Maggio, 211 F.3d at 1350; Swann v. S. Health Partners, Inc., 388 F.3d 834, 836 (11th Cir. 2004).

v. Pachtman, 424 U.S. 409, 427-28, 96 S. Ct. 984, 993-94 (1976). "[A]t common law, '[t]he general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution.'" Malley v. Briggs, 475 U.S. 335, 342, 106 S. Ct. 1092, 1097 (1986) (quoting Imbler, 424 U.S. at 437, 96 S. Ct. at 996). In § 1983 actions, prosecutors have absolute immunity for all activities that are "'intimately associated with the judicial phase of the criminal process.'" Van de Kamp v. Goldstein, __ U.S. __, 129 S.Ct. 855, 860 (2009) (quoting Imbler, 424 U.S. at 430, 96 S. Ct. at 995); accord Jones, 174 F.3d at 1281.

Absolute immunity does not depend entirely on a defendant's job title, but involves a functional approach granting immunity based on conduct. Jones, 174 F.3d at 1282. This functional approach looks to "the nature of the function performed, not the identity of the actor who performed it." Buckley v. Fitzsimmons, 509 U.S. 259, 269, 113 S. Ct. 2606, 2613 (1993); accord Imbler, 424 U.S. at 431 n. 33, 96 S. Ct. at 995 n. 33.

Absolute immunity accordingly applies to the prosecutor's actions "in initiating a prosecution and in presenting the State's case." Imbler, 424 U.S. at 431, 96 S. Ct. at 995. Prosecutors are immune for appearances in judicial proceedings, including prosecutorial conduct before grand juries, statements made during trial, examination of witnesses, and presentation of evidence in support of a search warrant during a probable cause hearing. Burns v. Reed, 500 U.S. 478, 490-92, 111 S. Ct. 1934, 1942 (1991); Kalina v. Fletcher, 522 U.S. 118, 126, 118 S. Ct. 502, 507-08 (1997); see also Van de Kamp, 129 S.Ct. at 861. "A prosecutor enjoys absolute immunity from allegations stemming from the prosecutor's function as advocate." Jones, 174 F.3d at 1281. Such absolute immunity also "extends to a prosecutor's acts undertaken . . . in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State." Id. (quotation marks omitted); accord Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1279-80 (11th Cir. 2002) (holding prosecutor who proffered perjured testimony and fabricated exhibits at trial is entitled to absolute immunity, but a prosecutor who participated in the search of a suspect's apartment is entitled to only qualified immunity).

If a prosecutor functions in a capacity unrelated to his role as an advocate for the state, he is not protected by absolute immunity but enjoys only qualified immunity. Kalina, 522 U.S. at 121, 118 S. Ct. at 505 (concluding prosecutor was acting as a witness in personally attesting to truth of averments in a "Certification for Determination of Probable Cause" for an arrest warrant and was not absolutely immune for that witness act, but that prosecutor was absolutely immune for preparing and filing an "information charging respondent with burglary and a motion for an arrest warrant"); Buckley, 509 U.S. at 275-77, 113 S. Ct. at 2616-18 (concluding prosecutor's pre-indictment fabrication of third-party expert testimony linking defendant's boot to bootprint at murder scene and post-indictment participation in a press conference were not protected by absolute immunity); Burns, 500 U.S. at 496, 111 S. Ct. at 1944-45 (stating prosecutors do not enjoy absolute immunity for giving pre-indictment legal advice to the police). A prosecutor is not entitled to absolute immunity when he "performs the investigative functions normally performed by a detective or police officer." Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; accord

Jones, 174 F.3d at 1281-82 ("Although absolutely immune for actions taken as an advocate, the prosecutor has only qualified immunity when performing a function that is not associated with his role as an advocate for the state"); see also Malley, 475 U.S. at 340-41, 106 S. Ct. at 1096 (concluding police officer was not absolutely immune for drafting "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants).

B. Qualified Immunity

Qualified immunity shields government officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). A government agent is entitled to immunity unless his act is "so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing." Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc).

To evaluate claims of qualified immunity, the Court considers whether (1) the plaintiff has alleged a violation of a constitutional right; and (2) whether the right was "clearly established" at the time of the defendant's misconduct. This two-pronged analysis may be done in whatever order is deemed most appropriate for the case. Pearson v. Callahan, 555 U.S. ___, 129 S.Ct. 808, 821 (2009).

With this immunity background, we turn to Rehberg's claims.

III. COUNT 6 – MALICIOUS PROSECUTION

Count 6 alleges Defendants Hodges and Paulk violated Rehberg's Fourth and Fourteenth Amendment rights through their "malicious prosecution" of him, resulting in his indictment and arrest.[6] Rehberg alleges that (1) Hodges and Paulk knew there was no probable cause to indict him, and therefore they got together with malice, fabricated evidence (i.e., Paulk's false testimony), and decided to present that fabricated evidence to the grand jury; (2) Paulk, at Hodges's direction, then testified falsely before the grand jury, resulting in Rehberg's indictment and arrest; and (3) Hodges and Paulk invaded Rehberg's privacy by illegally issuing subpoenas to BellSouth, Alltel, and Exact Advertising, without any pending indictment and as a discovery device for private civilians. We first discuss Paulk's false testimony before the grand jury and then the Defendants' pre-indictment conduct and subpoenas.

A. Paulk's Grand Jury Testimony

Even if Hodges and Paulk knew Paulk's testimony was false, Paulk receives absolute immunity for the act of testifying to the grand jury. Briscoe v. LaHue, 460 U.S. 325, 326, 103 S. Ct. 1108, 1111-12 (1983) (affirming that common-law immunities granted to witnesses in judicial proceedings required giving absolute immunity from § 1983 suit to police officer accused of giving false testimony at trial); Burns, 500 U.S. at 492, 111 S. Ct. at 1942 (holding prosecutor was absolutely immune for "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing"); Jones, 174 F.3d at 1288 ("[P]rosecutors and witnesses have absolute immunity for claims of conspiracy to commit perjury based on a witness's allegedly false testimony at trial, before a grand jury, or at a post-conviction hearing."); Strength v. Hubert, 854 F.2d 421, 422-24 (11th Cir. 1988) (concluding investigator for state Attorney General's office received absolute immunity for false testimony to a grand jury, at which the defendant investigator was the sole witness);[7] Kelly v. Curtis, 21 F.3d 1544, 1553 (11th Cir. 1994) (holding detective immune for grand jury testimony).

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[6] Rehberg alleges his arrest was an unreasonable seizure. The Fourth Amendment protection against "unreasonable" searches and seizures was made applicable to the States through the Fourteenth Amendment. Major League Baseball v. Crist, 331 F.3d 1177, 1179 n. 4 (11th Cir. 2003).

We recognize that Plaintiff Rehberg alleges Defendant Paulk was the sole "complaining witness" before the grand jury. However, in Jones, "we expressly reject[ed] carving out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." Jones, 174 F.3d at 1287 n. 10; see Rowe, 279 F.3d at 1285 (stating Jones "reject[ed] an exception for the testimony of 'complaining witnesses' "). In Jones, this Court aligned itself with the Third Circuit's decision in Kulwicki v. Dawson, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992), which rejected the "complaining witness" exception to absolute immunity for false grand jury testimony. Jones, 174 F.3d at 1287 n.10. The Jones Court reasoned that allowing civil suits for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings:

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[7] Overruled on other grounds, Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996).

> [T]his case vividly illustrates the serious problems with carving out such an exception and imposing civil liability for . . . false testimony deceiving the grand jury. To prove or to defend against such a claim would necessitate depositions from the prosecutor, the grand jury witnesses, and the grand jury members . . . [which], in effect, would emasculate both the absolute immunity for grand jury testimony and the confidential nature of grand jury proceedings. The remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages.

Jones, 174 F.3d at 1287 n. 10.[8] And the Supreme Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." United States v. Sells Eng'g, Inc., 463 U.S. 418, 424, 103 S. Ct. 3133, 3138 (1983) (quotation marks omitted). Based on Jones, we reject Rehberg's "complaining witness" exception to absolute immunity for false grand jury testimony.[9]

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[8] In Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999), this Court declined to decide whether to adopt a "complaining witness" exception because there was no factual finding in that case that the defendant Georgia Bureau of Investigation officer was equivalent to a "complaining witness." Id. at 1367 n. 1. So Mastroianni did not answer the question presented here, but Jones did.

B. Hodges and Paulk's Pre-Indictment Investigation

Distilled to its essence, Defendants' alleged pre-indictment conduct (excepting the subpoenas) is this: Hodges and Paulk, acting as investigators, got together as a favor to the hospital, with malice and without probable cause, and made up a story about Rehberg, and then Paulk (at Hodges's direction) told that fake story under oath to the grand jury, leading to Rehberg's indictment and arrest. We already determined supra that Paulk receives absolute immunity for the actual grand jury testimony itself. The question before us now is whether absolute immunity applies to the alleged conspiracy decision in the investigative stage to make up and present Paulk's false testimony to the grand jury. Our precedent answers this question too. See Mastroianni, 173 F.3d at 1367; Rowe, 279 F.3d at 1282; Jones, 174 F.3d at 1289.

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[9] Two circuits carved out a complaining-witness exception to absolute immunity for false grand jury testimony. See, e.g., Harris v. Roderick, 126 F.3d 1189, 1199 (9th Cir. 1997) (Deputy U.S. Marshals not absolutely immune for false testimony before a grand and petit jury); White v. Frank, 855 F.2d 956 (2d Cir. 1988) (police officer, as the "complaining witness," was not absolutely immune for false grand jury testimony). These decisions rely on Malley v. Briggs, 475 U.S. at 340, 106 S. Ct. at 1096, which concluded that a police officer did not receive absolute immunity for drawing up "felony complaints" with malice and without probable cause and submitting them in support of an application for arrest warrants. The Supreme Court held similarly in Kalina v. Fletcher, 522 U.S. at 120, 129-31, 118 S. Ct. at 505, 509-10, finding a prosecutor was not absolutely immune for acting as a witness in personally attesting to the truth of averments in a certification affidavit supporting an application for probable cause for an arrest warrant.

Acknowledging White v. Frank relies on Malley, the Jones Court noted that carving out an immunity exception for grand jury testimony would eviscerate the secrecy of grand jury proceedings, a concern not implicated by the "felony complaints" filed to support an arrest warrant in Malley and the personal certification for an arrest warrant in Kalina.

In Mastroianni, the plaintiff alleged defendant Yeomans, a Georgia Bureau of Investigation agent, "engaged in a pretestimonial conspiracy to present false evidence, for which neither absolute nor qualified immunity is available." Mastroianni, 173 F.3d at 1367. This Court first stressed that "a witness has absolute immunity from civil liability based on his grand jury testimony. See Strength, 854 F.2d at 425, relying on Briscoe v. La Hue, 460 U.S. 325, 103 S. Ct. 1108 [ ] (1983)." Id. The Mastroianni Court then pointed out that while the plaintiff "contend[ed] that Yeomans committed numerous acts in furtherance of a conspiracy to present false testimony before the grand jury convened, the record itself support[ed] such an inference only if we consider as evidence Yeomans' testimony as it relates back to Yeomans' pretestimonial acts and statements." Mastroianni, 173 F.3d at 1367. In other words, because the only evidence to show a conspiracy in the pre-indictment phase was Yeomans's later false grand jury testimony, and because Yeomans was immune for that testimony, we concluded that Yeomans was absolutely immune for conspiracy to present or give grand jury testimony. Id. ("Because we may not consider such testimony as a factor upon which to base Yeomans' potential liability, we conclude that Yeomans is entitled to absolute immunity for his actions in this case").

This Court subsequently applied Mastroianni in Jones and Rowe, in each case concluding that absolute immunity applied equally both to the false testimony itself and to the alleged conspiracies to present false testimony. Jones, 174 F.3d at 1289 ("To allow a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front"); Rowe, 279 F.3d at 1282 ("It would be cold comfort for a prosecutor to know that he is absolutely immune from direct liability for actions taken as prosecutor, if those same actions could be used to prove him liable on a conspiracy theory involving conduct for which he was not immune").

Since Paulk receives absolute immunity for his false testimony before the grand jury, Hodges and Paulk are similarly immune for their alleged conspiracy to fabricate and present false testimony to the grand jury. Rowe, 279 F.3d at 1282 ("[A] witness's absolute immunity from liability for testifying forecloses any use of that testimony as evidence of the witness's membership in a conspiracy prior to his taking the stand").

It is important to point out that Hodges and Paulk generally would not receive absolute immunity for fabricating evidence, because investigating and gathering evidence falls outside the prosecutor's role as an advocate. See Buckley, 509 U.S. at 262-64, 113 S. Ct. at 2610-11 (no immunity for prosecutor who fabricated expert testimony linking defendant's boot with bootprint at murder scene); Rowe, 279 F.3d at 1281 (no immunity for fabrication of jump rope); Jones, 174 F.3d at 1289-90 (no immunity for fabrication of bootprint); Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997) (no immunity for police officer's planting of cocaine). All of these cases involved a particular discrete item of physical or expert evidence that was falsely created during the investigative stage to link the accused to a crime.

In contrast, there is no allegation of any physical or expert evidence that Hodges or Paulk fabricated or planted. There is no allegation of a pre-indictment document such as a false affidavit or false certification. Rather, Hodges and Paulk are accused of fabricating together only the testimony Paulk later gave to the grand jury. No evidence existed until Paulk actually testified to the grand jury. Stated differently, the only evidence Rehberg alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity.[10]

For all these reasons, we conclude Hodges and Paulk are entitled to absolute immunity for the pre-indictment conduct of conspiring to make up and present Paulk's false testimony to the grand jury.

C. Subpoenas During Investigation

Rehberg's allegations regarding the subpoenas to his telephone and Internet providers all recount pre-indictment investigative conduct by Hodges and Paulk. A prosecutor loses the cloak of absolute immunity by stepping out of his role as an advocate and performing "investigative" functions more commonly performed by law enforcement officers. Buckley, 509 U.S. at 273, 113 S. Ct. at 2616; Burns, 500 U.S. at 496, 111 S. Ct. at 1944-45; Rowe, 279 F.3d at 1280; Jones, 174 F.3d at 1285. Hodges and Paulk accordingly do not receive absolute immunity for preparing and filing subpoenas during the investigation of Rehberg.

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[10] Rehberg does not allege, for instance, that Hodges and Paulk fabricated physical evidence linking him to Dr. Hotz's house or convinced another witness to testify falsely about Rehberg's involvement. The only evidence presented to the grand jury was Paulk's testimony and Dr. Hotz's testimony (which Rehberg does not allege was false).

Hodges and Paulk, however, do receive qualified immunity because Rehberg's subpoena allegations do not state a constitutional violation.[11] The subpoenas covered information Rehberg had provided voluntarily to third parties and for which Rehberg did not have a legitimate expectation of privacy. Thus, the subpoenas did not violate Rehberg's Fourth Amendment rights to be free of unreasonable search and seizure.[12]

In order for Fourth Amendment protections to apply, the person invoking the protection must have an objectively reasonable expectation of privacy in the place searched or item seized. Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 473 (1998); Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967). The Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582 (1979). "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." United States v. Miller, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624 (1976).

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[11] Rehberg's complaint does not allege Defendant Burke participated in the issuance of the subpoenas.

[12] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

More specifically, a person does not have a legitimate expectation of privacy in the numerical information he conveys to a telephone company in the ordinary course of business. Smith, 442 U.S. at 743-44, 99 S. Ct. at 2582 ("[E]ven if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is prepared to recognize as reasonable") (quotation marks omitted); accord United States v. Thompson, 936 F.2d 1249, 1250 (11th Cir. 1991) ("The Supreme Court has held that the installation of a pen register does not constitute a search under the Fourth Amendment of the Constitution and does not warrant invocation of the exclusionary rule.").

Here, Rehberg lacks a reasonable expectation of privacy in the phone and fax numbers he dialed. Once he voluntarily provided that information to BellSouth and Alltel (later Sprint), Rehberg lacked any further valid expectation that those third parties would not turn the information over to law enforcement officers. Absent a valid right of privacy, Rehberg cannot state a constitutional violation regarding the subpoenas for his phone and fax information.

A person also loses a reasonable expectation of privacy in emails, at least after the email is sent to and received by a third party. See Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) (An individual sending an email loses "a legitimate expectation of privacy in an e-mail that had already reached its recipient"); United States v. Lifshitz, 369 F.3d 173, 190 (2d Cir. 2004) (An individual may not "enjoy [ ] an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient"); see also United States v. Perrine, 518 F.3d 1196, 1204-05 (10th Cir. 2008) ("Every federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation") (collecting cases).

Rehberg's voluntary delivery of emails to third parties constituted a voluntary relinquishment of the right to privacy in that information. Rehberg does not allege Hodges and Paulk illegally searched his home computer for emails, but alleges Hodges and Paulk subpoenaed the emails directly from the third-party Internet service provider to which Rehberg transmitted the messages. Lacking a valid expectation of privacy in that email information, Rehberg fails to state a Fourth Amendment violation for the subpoenas for his Internet records.

Because Rehberg's allegations related to the subpoenas do not state a violation of a constitutional right, the district court erred in denying qualified immunity to Hodges and Paulk on Rehberg's subpoena claims.

IV. COUNT 7 – RETALIATORY PROSECUTION

In Count 7, Rehberg alleges Hodges and Paulk violated his First Amendment free speech rights by retaliating against him for his criticism of the hospital in his faxes. Rehberg alleges Hodges's and Paulk's decisions to investigate him, issue subpoenas, provide his information to paid civilians, and procure wrongful indictments were in retaliation for his faxes and criticism of the hospital and were all made without probable cause.[13]

We first review Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695 (2006), which addresses retaliatory-prosecution claims.

A. Hartman v. Moore

In Hartman, plaintiff Moore brought a Bivens[14] action against postal inspectors and a federal prosecutor for retaliatory prosecution.[15] Because of Moore's criticism of and lobbying to the U.S. Postal Service, postal inspectors launched criminal investigations against Moore and pressured the United States Attorney's Office to indict him, "[n]otwithstanding very limited evidence." Id. at 253-54, 126 S. Ct. at 1699-1700. Although they did not testify, the postal inspectors drafted "witness statements" for other witnesses and provided them to the prosecutor, who presented them to the grand jury. Moore v. United States, 213 F.3d 705, 707 (D.C. Cir.

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[13] To the extent Rehberg relies on the Fourth Amendment, "there is no retaliation claim under the Fourth Amendment separate and distinct from [Rehberg's] malicious prosecution . . . claim[ ]." Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003). "Instead, the only cause of action for retaliation that arguably applies here is retaliatory prosecution in violation of the First Amendment." Id.

[14] See Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971).

[15] Moore's company manufactured a multiline optical character reader useful in sorting mail. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. He lobbied the U.S. Postal Service to purchase multiline readers and criticized its reliance on single-line readers. Id. at 253, 126 S. Ct. at 1699.

2000). The district court dismissed the criminal charges against Moore for a "complete lack of direct evidence." Hartman, 547 U.S. at 254, 126 S. Ct. at 1700.

In Moore's subsequent Bivens action for retaliatory prosecution, the district court granted absolute immunity to the prosecutor but denied qualified immunity to the postal inspectors. Id. at 255, 126 S. Ct. at 1701. As to the prosecutor, the D.C. Circuit affirmed absolute immunity for the retaliatory decision to prosecute Moore and the prosecutor's concealment of exculpatory evidence from the grand jury, manipulation of evidence before the grand jury, and failure to disclose exculpatory material before trial. Moore, 213 F.3d at 708. As to the postal inspectors, the D.C. Circuit affirmed the denial of qualified immunity and allowed Moore's retaliatory-prosecution claim to proceed against them, even though Moore had not shown an absence of probable cause for the criminal charges against him.

In reversing the D.C. Circuit's denial of qualified immunity to the postal inspectors, the Supreme Court in Hartman concluded that to bring a retaliatory-prosecution claim, the plaintiff must show an absence of probable cause for the prosecution. Hartman, 547 U.S. at 252, 126 S. Ct. at 1699. The Supreme Court first noted, "as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." Id. at 256, 126 S. Ct. at 1701 (citations and quotation marks omitted). The Supreme Court, however, explained that a retaliatory-prosecution suit cannot be brought against the prosecutor, but only against the "non-prosecuting official" who successfully induced the prosecutor to bring charges that would not otherwise have been brought, as follows:

> A Bivens (or § 1983) action for retaliatory prosecution will not be brought against the prosecutor, who is *absolutely immune from* liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision *but did not himself make it, and the cause of* action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute. The consequence is that a plaintiff like Moore must show that *the nonprosecuting official acted in retaliation*, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging.

Id. at 261-62, 126 S. Ct. at 1704-05 (emphasis added). To sue for retaliatory prosecution, a plaintiff must establish a "but-for" causal connection between the retaliatory animus of the non-prosecutor and the prosecutor's decision to prosecute. See id. at 256, 261, 126 S. Ct. at 1701, 1704 (discussing "but-for cause" and "but-for basis" for the prosecutor's decision to prosecute).[16]

And Hartman *indicates that to establish* a prima facie case of this but-for causal connection, a plaintiff must plead and prove both (1) a retaliatory motive on the part of the non-prosecutor official, and (2) the absence of probable cause supporting the prosecutor's decision. Id. at 265, 126 S. Ct. at 1706; see also Wood, 323 F.3d at 883 (First Amendment retaliatory-prosecution claim is defeated by the existence of probable cause). A retaliatory motive on the part of a "non-prosecuting official" combined with an absence of probable cause will create "a prima facie inference that the unconstitutionally motivated inducement infected the prosecutor's decision to bring the charge. Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. Importantly, the absence of probable cause "is not necessarily dispositive" of whether the unconstitutionally motivated inducement succeeded, but will create a prima facie inference that it did. Id. The burden then shifts to the defendant official to show "that the action would have been taken anyway, independently of any retaliatory animus." Id. at 261, 126 S. Ct. at 1704. In other words, the defendant official will not be liable if he can show the prosecutor would have taken the action complained of anyway. Id.

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[16] In a footnote, the Supreme Court noted that Moore's complaint charged *the prosecutor with acting in both an investigatory* and prosecutorial capacity, but that no appeal or claim against the prosecutor was before the Supreme Court. Hartman, *547 U.S.* at *262 n.8, 126 S. Ct.* at *1705 n.8.*

B. Rehberg's Retaliatory-Prosecution Claims

Hartman dictates the outcome of Rehberg's retaliatory-prosecution claim in Count 7. First, as to Hodges, Rehberg alleges Hodges was in communication with Burke about the decision to prosecute, even after Hodges recused. Hodges's alleged decision to prosecute Rehberg, even if made without probable cause and even if caused solely by Paulk's and his unconstitutional retaliatory animus, is protected by absolute immunity. Hartman, 547 U.S. at 261-62, 126 S. Ct. at 1704-05.

As to Paulk, Rehberg must show investigator Paulk's retaliation against Rehberg successfully induced the prosecution and was the "but-for" cause of the prosecution. Hartman, 547 U.S. at 265, 126 S. Ct. at 1701. Accordingly, Rehberg must show that prosecutor Burke (himself or with Hodges's influence) would not have prosecuted Rehberg but for Paulk's retaliatory motive and conduct.[17]

The very detailed allegations in Rehberg's complaint satisfy the two requirements for a prima facie case of retaliatory prosecution: non-prosecutor Paulk's retaliatory motive, and the absence of probable cause for prosecutor Burke to bring charges. Hartman, 547 U.S. at 265, 126 S. Ct. at 1706. For example, Rehberg alleges "[t]here was no probable cause for the underlying criminal charges against Mr. Rehberg and such charges would not have been brought if there was no retaliatory motive." Rehberg supports this alleged lack of probable cause by alleging Paulk admitted that "he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary," and Paulk's false testimony was the only evidence Burke presented in support of the first indictment. Without Paulk's allegedly false testimony, Burke could not have procured the first indictment because there was no other evidence. Rehberg also alleges Hodges and Paulk acted in retaliation for Rehberg's criticisms of the activities and financial management of a public hospital to which they had close political connections and personal relationships and that chilling Rehberg's speech was a motivating factor in all of Hodges's and Paulk's conduct in investigating and prosecuting him.

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[17] Count 7 of Rehberg's complaint does not name Burke as a defendant, but Count 7 claims Paulk's retaliatory motive and actions "wrongfully influenced and instigated the prosecutorial decision to bring charges against Mr. Rehberg."

In sum, Rehberg sufficiently has alleged the requisite retaliatory motive, absence of probable cause, and but-for causation (i.e., that Burke would not have prosecuted Rehberg but for Paulk's false testimony). Therefore, at this pleading juncture, the district court did not err in denying absolute and qualified immunity to Defendant Paulk on Rehberg's retaliatory-prosecution claim.

C. Retaliatory Investigation Claim

Rehberg's complaint also alleges a "retaliatory investigation" claim against Hodges and Paulk. For example, Rehberg's complaint alleges Hodges and Paulk together decided to investigate Rehberg and took several steps during the investigation because each of them had retaliatory animus. These allegations of coordinated and joint actions are replete throughout the complaint. E.g., Compl. ¶¶ 99 ("Mr. Paulk and Mr. Hodges instituted an investigation . . ."), 124 ("Chilling his political speech was a substantial or motivating factor in the wrongful conduct of Mr. Paulk and Mr. Hodges in investigating Mr. Rehberg . . ."), 157-61 (conspiracy claim).

Hartman does not help us with this claim because the Supreme Court pointedly did not decide whether "simply conducting retaliatory investigation with a view to promote prosecution is a constitutional tort." Hartman, 547 U.S. at 262 n. 9, 126 S. Ct. at 1705 n. 9 ("Whether the expense or other adverse consequences of a retaliatory investigation would ever justify recognizing such an investigation as a distinct constitutional violation is not before us").[18]

As noted above, only qualified immunity, not absolute immunity, applies to conduct taken in an investigatory capacity as opposed to a prosecutorial capacity. The only actual investigatory conduct alleged is the issuance of subpoenas, which, as we already stated above, did not violate Rehberg's Fourth Amendment rights. Because Hodges and Paulk's issuance of the subpoenas did not violate Rehberg's constitutional rights (Count 6), we are inclined to agree with the government that Hodges and Paulk's retaliatory animus (Count 7) does not create a distinct constitutional tort.[19]

But even if we assume Rehberg has stated a constitutional violation by alleging that Hodges and Paulk initiated an investigation and issued subpoenas in retaliation for Rehberg's exercise of First Amendment rights, Hodges and Paulk still receive qualified immunity because Rehberg's right to be free from a retaliatory investigation is not clearly established. The Supreme Court has never defined retaliatory investigation, standing alone, as a constitutional tort, Hartman, 547 U.S. at 262 n.9, 126 S. Ct. at 1705 n.9, and neither has this Court. Without this sort of precedent, Rehberg cannot show that the retaliatory investigation alleged here violated his First Amendment rights. See Oliver v. Fiorino, 586 F.3d 898, 907 (11th Cir. 2009) ("In order to determine whether a right is clearly established, we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances"). Hodges and Paulk accordingly are entitled to qualified immunity for Rehberg's retaliatory investigation claims in Count 7.

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[18] Rehberg does not allege he incurred any expenses in the investigation stage.

[19] The initiation of a criminal investigation in and of itself does not implicate a federal constitutional right. The Constitution does not require evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the government can begin investigating that suspect. See United States v. Aibejeris, 28 F.3d 97, 99 (11th Cir. 1994). No Section 1983 liability can attach merely because the government initiated a criminal investigation.

V. COUNT 8 – FABRICATION OF EVIDENCE AND PRESS STATEMENTS AGAINST BURKE

Count 8 is against only Burke. Rehberg alleges Burke violated his "constitutional rights" by (1) "participat[ing] in fabricating evidence"; (2) presenting Paulk's perjured testimony to the grand jury; and (3) making defamatory statements to the media which "damaged Mr. Rehberg's reputation."[20]

As a special prosecutor appointed to stand in for Hodges, Burke receives the full scope of absolute prosecutorial immunity and is absolutely immune for Rehberg's claims of malicious prosecution and the presentation of perjured testimony to a grand jury. For the same reasons explained above, Burke also is absolutely immune for participating in the conspiracy to fabricate Paulk's grand jury testimony against Rehberg.

Burke's statements to the media, however, are not cloaked in absolute immunity because

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[20] Burke is not alleged to have participated in subpoenaing Rehberg's telephone and Internet providers.

"[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor," and they are not part of the prosecutor's role as an advocate of the State. See Buckley, 509 U.S. at 277-78, 113 S. Ct. at 2618 ("The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions"); Hart v. Hodges, 587 F.3d 1288, 1297 (11th Cir. 2009). Burke's immunity for the alleged press statements must arise, if at all, through qualified immunity.

A tort claim, such as Rehberg's defamation allegation in Count 8, does not give rise to a § 1983 due process claim unless there is an additional constitutional injury alleged. Cypress Ins. Co. v. Clark, 144 F.3d 1435, 1438 (11th Cir. 1998). "The Supreme Court . . . held that injury to reputation, by itself, does not constitute the deprivation of a liberty or property interest protected under the Fourteenth Amendment." Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005) (citing Paul v. Davis, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 1160-61 (1976)).[21] Damages to a plaintiff's reputation "are only recoverable in a section 1983 action if those damages were incurred as a result of government action significantly altering the plaintiff's constitutionally recognized legal rights." Cypress, 144 F.3d at 1438.

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[21] Rehberg does not specifically identify what constitutional provision Burke's media statements violated. We assume Rehberg asserts a Fourteenth Amendment due process claim. See, e.g., Paul, 424 U.S. at 712, 96 S. Ct. at 1165-66; Cypress, 144 F.3d at 1436. Rehberg does not identify another constitutional theory that might support a Section 1983 action for false statements to the media.

This doctrine is known as the "stigma-plus" test, Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1302 (11th Cir. 2001), and requires the plaintiff to show both a valid defamation claim (the stigma) and "the violation of some more tangible interest" (the plus). Behrens, 422 F.3d at 1260 (quotation marks omitted). "To establish a liberty interest sufficient to implicate the fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with . . . [a] government official's conduct [that] deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation." Id. (citations and quotation marks omitted).[22] The "stigma-plus" test requires not only allegations stating a common law defamation claim, but also an additional constitutional injury, tied to a previously recognized constitutional property or liberty interest, flowing from the defamation. Cypress, 144 F.3d at 1436-37.

Rehberg's complaint alleges damage to his reputation but does not allege the required deprivation of any previously recognized constitutional property or liberty interest. The only factual allegations Rehberg makes regarding Burke's media statements are these: "Mr. Rehberg . . . was subjected to extensive publicity in the media where he was identified as being charged with multiple felonies and misdemeanors, and publicly identified by the acting District Attorney as having committed an assault and burglary. The damage of three indictments on his public record will remain with him and his wife and children for the rest of their lives." He continues by alleging, "[t]hese wrongful indictments will always be associated with his name and have caused and will cause significant personal, professional and economic damages to Mr. Rehberg." Rehberg alleges Burke's media statements "wrongfully damaged [his] reputation."

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[22] "While we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." Paul, 424 U.S. at 701, 96 S. Ct. at 1160-61; see also Siegert v. Gilley, 500 U.S. 226, 234, 111 S. Ct. 1789, 1794 (1991) ("Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action.").

In short, Rehberg's defamation allegations are too generalized to show a previously recognized constitutional deprivation flowing from Burke's alleged defamatory statements. Damage to reputation alone is insufficient to state a Fourteenth Amendment due process claim. Cypress, 144 F.3d at 1437-38 ("Indeed, [in Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789 (1991)] the [Supreme] Court specifically rejected the notion that defamation by a government actor that causes injury to professional reputation violates procedural due process").

The district court averted this settled law by connecting Burke's media statements to "the alleged Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges." This was error. The "stigma-plus" test requires the plaintiff to show deprivation of a previously recognized Fourteenth Amendment property or liberty interest "in connection with" the claimed defamation. Even liberally construed, Rehberg's complaint does not allege a procedural due process claim under the Fourteenth Amendment. See Albright v. Oliver, 510 U.S. 266, 272, 114 S. Ct. 807, 812 (1994). Rehberg does not allege Dougherty County or the individual defendants denied him the constitutionally required procedures necessary to challenge his indictments and arrest. Indeed, Rehberg's successful challenges to the three indictments show otherwise. And, under the Fourteenth Amendment, there is no substantive due process right to be free from malicious prosecution without probable cause. Id. at 274, 114 S. Ct. at 813. A malicious prosecution claim arises under the Fourth Amendment, not Fourteenth Amendment substantive due process.

Therefore, the only remaining "plus" Rehberg identifies is the right to be free from malicious prosecution and unreasonable detention under the Fourth Amendment. However, Rehberg's complaint does not allege that Burke's media statements caused Rehberg's indictments and arrest.[23] For example, there is no allegation that the grand jury relied on Burke's press statements in indicting Rehberg or that the Defendants relied on Burke's media statements as probable cause to arrest Rehberg. Paul's "stigma-plus" test is not satisfied by simply alleging a constitutional violation somewhere in the case. The constitutional violation must itself flow from the alleged defamation.[24]

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[23] The complaint does not clearly state whether Burke made his media statements before Rehberg was indicted or after, but the complaint also does not allege any fact showing that Burke's media statements caused Rehberg to be indicted.

In any event, Rehberg cannot use the prosecution itself (the indictment and arrest) as the basis for constitutional injury supporting a § 1983 defamation claim. The Seventh Circuit considered this precise situation, concluding the plaintiff must point to some constitutional wrong, other than the indictment and related events, in order to support a § 1983 constitutional claim based on defamation. "Identifying the arrest and imprisonment as the loss of liberty does not assist [the plaintiff], however, because [the prosecutor] has absolute immunity from damages for these events." Buckley v. Fitzsimmons, 20 F.3d 789, 797 (7th Cir. 1994), cert. denied, 513 U.S. 1085, 115 S. Ct. 740 (1995) (rejecting plaintiff's arrest as a sufficient "plus" under the stigma-plus test). The Seventh Circuit explained that, "the Supreme Court [ ] adopt[ed] a strict separation between the prosecutor's role as advocate and the ancillary events (such as press conferences) surrounding the prosecution. It would be incongruous to treat the press conference and the prosecution as distinct for purposes of immunity but not for purposes of defining the actionable wrong." Id. at 797-98. The Seventh Circuit concluded that, "a plaintiff who uses a 'stigma plus' approach to avoid Paul and Siegert must identify a

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[24] The district court cited Riley v. City of Montgomery, Ala., 104 F.3d at 1253, for the proposition that fabricating evidence violates an accused's constitutional rights, and thus since Rehberg alleges fabrication in this case, he satisfied Paul's "stigma-plus" test. Even assuming evidence was fabricated and that this fabrication was a constitutional violation, nothing in the complaint connects Hodges's and Paulk's alleged evidence fabrication to Burke's press statements.

'plus' other than the indictment, trial, and related events for which the defendants possess absolute prosecutorial immunity." *Id.* at 798.

Therefore Rehberg failed to satisfy *Paul's* "stigma-plus" test and fails to allege a constitutional claim based on the press statements. This lack of a constitutional claim means Burke receives qualified immunity for his press statements. The district court erred by not finding Burke immune for the allegations in Count 8.

VI. COUNT 10 – CONSPIRACY

Count 10 alleges Hodges, Burke, and Paulk engaged in a conspiracy to violate Rehberg's constitutional rights under the First, Fourth, and Fourteenth Amendments.

"A person may not be prosecuted for conspiring to commit an act that he may perform with impunity." *Jones*, 174 F.3d at 1289 (citations omitted). A prosecutor cannot be liable for "conspiracy" to violate a defendant's constitutional rights by prosecuting him if the prosecutor also is immune from liability for actually prosecuting the defendant. *Rowe*, 279 F.3d at 1282. And a witness's absolute immunity for testifying prevents any use of that testimony as evidence of the witness's membership in an unconstitutional conspiracy prior to his testimony. *Id.*; *Mastroianni*, 173 F.3d at 1367.

Rehberg's conspiracy allegations do not enlarge what he alleged previously in his complaint. This opinion has already explained why Hodges, Burke, and Paulk receive absolute or qualified immunity for all of the conduct alleged in Counts 6 and 8 and why Hodges receives absolute immunity for the retaliatory prosecution in Count 7. Rehberg cannot state a valid conspiracy claim by alleging the Defendants conspired to do things they already are immune from doing directly.

The only portion of Count 7 that remains is Rehberg's retaliatory prosecution claim against Paulk alone. The intracorporate conspiracy doctrine bars conspiracy claims against corporate or government actors accused of conspiring together within an organization, preventing Rehberg's claim that Paulk "conspired" to initiate a retaliatory prosecution. Dickerson v. Alachua County Commission, 200 F.3d 761, 767 (11th Cir. 2000) ("[I]t is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself"); Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001) (applying intracorporate conspiracy doctrine to city, city fire chief, and city manager). Rehberg has not alleged that Paulk conspired with anyone outside of the District Attorney's office. See Denney, 247 F.3d at 1191 ("the only two conspirators identified . . . are both City employees; no outsiders are alleged to be involved"). The "conspiracy" occurred only within a government entity, and thus the intracorporate conspiracy doctrine bars Count 10 against Paulk. The district court erred in not dismissing Count 10.

VII. CONCLUSION

For the reasons explained above, Hodges and Paulk receive absolute immunity for Paulk's grand jury testimony and for the related pre-indictment conspiracy conduct alleged in Count 6; Hodges and Paulk receive qualified immunity for the issuance of subpoenas alleged in Count 6; Hodges receives absolute immunity for initiating a retaliatory prosecution as alleged in Count 7; Hodges and Paulk both receive qualified immunity for the retaliatory investigation alleged in Count 7; Burke receives absolute immunity for the allegations in Count 8, except for the alleged media statements, for which he receives qualified immunity; and Count 10's conspiracy claim fails. The only surviving claim from this appeal is the retaliatory-prosecution claim in Count 7 against Paulk, for which the district court correctly denied absolute and qualified immunity. We reverse the district court's order in part and remand this case for the district court to grant the Defendants' motions to dismiss and to enter judgment in favor of all Defendants on Counts 6, 7, 8, and 10, except for the retaliatory-prosecution claim against Paulk in Count 7.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA ALBANY DIVISION

CHARLES A. REHBERG,

Plaintiff,

vs. 1:07-CV-22(WLS)

JAMES P. PAULK, in his individual capacity, *et al.*,

Defendants.

ORDER

Presently pending before the Court are Defendants Burke and Hodges's Motion to Dismiss, Defendants Paulk and Dougherty County's Motion to Dismiss, and Defendant Dougherty County's Second Supplemental Motion to Dismiss. (Docs. 5, 6, 20).

For the reasons below, Defendants Burke and Hodges's Motion to Dismiss (Doc. 5) is **DENIED**; Defendants Paulk and Dougherty County's Motion to Dismiss (Doc. 6) is **GRANTED-IN-PART, DENIED-IN-PART**; and Defendant Dougherty County's Second Supplemental Motion to Dismiss (Doc. 20) is **DENIED as MOOT**.

BACKGROUND

Based upon the facts alleged in the Complaint (Doc. 1), as set forth in relevant part below, Plaintiff filed this suit against Defendants for violations of 42 U.S.C. § 1983 and Georgia state law.

FACTS[1]

On October 22, 2003, a subpoena was issued under the letterhead of Kenneth B. Hodges, III, District Attorney to Bell South requiring the production of certain telephone records. On December 1, 2003, another subpoena was issued, under the letterhead of Defendant Hodges, District Attorney, to Bell South for certain telephone records. On January 20, 2004 another subpoena was issued, also on Defendant Hodges's letterhead, to Bell South for certain telephone number records. On February 5, 2004, a subpoena for production of evidence was issued to Bell South Subpoena Compliance Center relating to Plaintiff's unlisted residential number. On February 24, 2004, a subpoena was issued to Alltel requiring production of information of records concerning certain telephone numbers. Sprint long distance responded on January 27, 2004 to Defendant Paulk in response to a Subpoena (date unknown) for certain prepaid long distance calls originated by Plaintiff. Defendant Paulk also prepared and issued a subpoena to Exact Advertising, the Internet service provider of one of Plaintiff's email accounts, and obtained Plaintiff's personal e-mails (sent and received from his personal computer).

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[1] The facts set forth below are gleaned from Plaintiff's Complaint (Doc. 1), because in consideration of a motion to dismiss, the Court must accept all of Plaintiff's well pleaded allegations as true. *See infra* pp. 5-6.

On the dates set forth in the numerous subpoenas for appearance, the Dougherty County Grand Jury was not meeting to consider the case of the State vs. Charles Rehberg, John Bagnato, and Jim Bowman. The case against Plaintiff was not presented to the Dougherty County Grand Jury until December 14, 2005. Defendant Paulk has now admitted that at the time he prepared and issued the subpoenas, "[t]here was not [a Grand Jury] impaneled." Upon receipt of the subpoenaed records, Defendant Paulk provided the records, including Plaintiff's personal e-mails, to private civilians, who in turn paid for the information. The subpoenas were never intended to require an appearance before the Grand Jury on any matter pending before a Grand Jury, but were intended to obtain confidential and private records for private civilians.

On December 14, 2005, Charles Rehberg was indicted on charges of aggravated assault, burglary and "harassing telephone calls" in Dougherty County. The allegations in the indictment arose from Plaintiff's alleged interactions with a Dr. James Hotz (the victim). However, the charges against Mr. Rehberg were false. Plaintiff has never been to the home of Dr. Hotz. There is no evidence that Plaintiff committed a burglary or aggravated assault on anybody as he was charged. Neither the Albany Police Department nor any other police agencies were ever involved in any investigation of this alleged assault or burglary. Defendant Paulk, the Chief Investigator to the District Attorney in the case, testified that he and Mr. Hodges initiated and handled the investigation of Plaintiff supposedly because "of lack of confidence in the City police department to handle it." Defendant Paulk testified before the grand jury as the complaining witness and verified to the grand jury that his testimony consisted of "true and accurate facts based upon the indictment." Yet, Defendant Paulk has now admitted that he never interviewed any witnesses or gathered any evidence indicating that Plaintiff committed any aggravated assault or burglary.

Based on the investigation conducted by Defendants Paulk, Hodges, and Burke, there was no probable cause to indict Plaintiff on charges of burglary, aggravated assault or "harassing" phone calls. The three indictments of Plaintiff were widely covered in the local and state press, including the Albany Herald, WALB-TV, WFXL-TV, and the Atlanta Journal. Defendant Burke conducted interviews with the press and also issued press statements in which he addressed challenges by Plaintiff's counsel and stated, "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them." Defendant Burke represented to the public and the press that Plaintiff had committed an assault. Defendant Burke also publicly stated, "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming."

Plaintiff's counsel filed pleadings attacking the legal sufficiency of the first indictment and a hearing was scheduled by the presiding judge. On February 2, 2006, Assistant District Attorney Kelly Burke dismissed and *nol-prossed* the entire indictment prior to the scheduled hearing, thus terminating the First Indictment. Defendants Burke and Paulk appeared before a second Grand Jury on or about February 15, 2006, and another indictment was issued

February 16, 2006. The second Indictment included charges of "simple assault" and five counts of "harassing telephone calls." Defendant Paulk again appeared as a state witness along with Dr. Hotz. At that time, Plaintiff still had never been to Dr. Hotz's home. There was still no evidence that Plaintiff committed an assault on anybody as he was charged. Plaintiff's counsel filed a motion attacking the legal sufficiency of the Second Indictment and the presiding judge scheduled a hearing. At a pretrial hearing held on April 10, 2006, Defendant Burke announced in open court that the Second Indictment was, or would immediately be dismissed. However, Defendant Burke failed to dismiss the Indictment. As a result, on July 7, 2006, as requested by Plaintiff's counsel, the Court dismissed the Second Indictment by Order of the Court, pursuant to the Defendant Burke's announcement made on April 10, 2006, thus terminating the Second Indictment.

Defendants Burke and Paulk appeared before a third Grand Jury on March 1, 2006 and secured a Third Indictment; again charging Plaintiff with "simple assault" and "harassing telephone calls." Plaintiff's counsel once again filed pleadings attacking the legal sufficiency of the pleadings and the presiding judge scheduled a hearing. On May 1,2006, Judge Harry Altman issued two orders dismissing all charges against Plaintiff.

DISCUSSION

Each Defendant, through the three motions to dismiss pending before the Court, moves to dismiss Plaintiff's Complaint as to all counts. Defendants rely on Federal Rule of Civil Procedure 12, which provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted . . . .

Fed. R. Civ. P. 12(b)(6). A motion to dismiss a plaintiff's complaint, or a portion thereof, under Federal Rule of Civil Procedure 12(b)(6) should not be granted unless Plaintiff fails to plead enough facts to state a claim to relief that is plausible[, and not merely just conceivable,] on its face. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (Citation omitted). *Id.* at 1964-65 (citing Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)). Accordingly, "[a]t the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1274 n.l (11th Cir. 1999). Finally, the "threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is . . . exceedingly low." Ancata v. Prison Health Servs. Inc., 769 F.2d 700, 703 (11th Cir. 1985) (quotation and citation omitted). The Court will address each motion to dismiss in turn.

I. DEFENDANTS HODGES AND BURKE'S MOTION TO DISMISS (Doc. 5)

Counts six, seven, eight, nine, and ten of Plaintiff's Complaint allege wrongful conduct by Defendants Hodges and/or Burke. Count VI alleges a Section 1983 claim against Defendant Hodges in his individual capacity, along with Defendant Paulk, for violating Plaintiff's rights under the Fourth and Fourteenth Amendments. Count VII alleges a Section 1983 claim against Defendant Hodges in his individual capacity, along with Defendant Paulk, for instigating a retaliatory prosecution. Count VIII alleges a Section 1983 claim against Defendant Burke in his individual capacity. Count IX alleges a Section 1983 claim against Defendant Hodges in his official capacity and Defendant Dougherty County. Finally, Count X alleges a conspiracy to violate Section 1983 and the constitutional rights of Plaintiff by Defendants Burke, Hodges, and Paulk in their individual capacities.

Defendants Hodges and Burke move to dismiss Plaintiff's Complaint on six separate grounds. First, Defendants argue that Plaintiff's § 1983 claims are barred by the two year statute of limitations. Second, Defendants contend that they are entitled to absolute immunity from Plaintiff's claims. Third, Defendant Burke contends that damage to one's reputation is not actionable under Section 1983. Fourth, Defendant Hodges argues that Plaintiff cannot support his claim of negligent supervision under a theory of respondeat superior alone. Fifth, Defendants contend that Plaintiff has not alleged a valid claim for conspiracy. Finally, Defendants argue that where all else fails, they are entitled to qualified immunity.

A. Statute of Limitations

Pursuant to O.C.G.A. § 9-3-33:

> Actions for injuries to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year after the right of action accrues, and except for actions for injuries to the person involving loss of consortium, which shall be brought within four years after the right of action accrues.

Although Georgia law provides the applicable statute of limitations for Plaintiff's claims, Mullinax v. McElhenney, 817 F.2d 711 (11th Cir. 1987) (citing Wilson v. Garcia, 471 U.S. 261, 269 (1985)), federal law determines when the same began to accrue. *Id.* "In Section 1983 cases, the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Id.* (citing Calhoun v. Ala. Alcoholic Beverage Control Bd., 705 F.2d 422,425 (11th Cir. 1983)). Stated more simply, the statute of limitations for a Section 1983 action does not begin to accrue until (1) a plaintiff knows or has reason to know that he has been injured and (2) is aware or should have been aware of who injured him. *Id.* A cause of action for malicious prosecution does not arise until the criminal proceeding that gives rise to such a claim is terminated in favor of the accused. Heck v. Humphrey, 512 U.S. 477, 484 (1994).

Defendants argue that Plaintiff's allegations are barred by the two year statute of limitations because the allegedly unlawful subpoenas were issued from approximately October 22, 2003 to February, 24, 2004–with February 2004 being more than two years prior to the January 2007 filing of Plaintiff's Complaint. Defendants also argue, confusingly, that any claims for action(s) which occurred before January 23, 2005 are barred by the statute of limitations. Finally, Defendants contend, incorrectly, that the first indictment in this case was "terminated in the Plaintiff's favor" more than two years before the filing of his Complaint.

Despite Defendants' arguments to the contrary, Plaintiff's claims against them are not barred by the statute of limitations specified in O.C.G.A. § 9-3-33. First, the initial indictment against Plaintiff was issued on December 14, 2005. The Court finds, as argued by Plaintiff, that merely because subpoenas were issued as early October 2003, it does not necessarily follow that Plaintiff would have immediately become aware of the illegality of the same. At a minimum on December 14, 2005, Plaintiff, proceeding as an indicted Defendant, had the ability to use the criminal discovery process to discover certain information surrounding the issuance of the allegedly unlawful subpoenas. Therefore, the statute of limitations for Plaintiff's causes of action relating to actions involving the investigation and instigation of the prosecutions against him did not begin to accrue until after the first indictment was issued against Plaintiff. At this time Plaintiff should have known the investigation, including the issuance of the subpoenas, was allegedly unlawful. Additionally, the first indictment was terminated in Plaintiff's favor on February 2, 20062, officially making any cause of

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[2] As noted by Plaintiff, it is quite unclear why Defendants argue "the first indictment was terminated in the Plaintiff's favor more than two years prior to the filing of this complaint."

action for malicious prosecution ripe for review anytime thereafter. Because the statute of limitation on Plaintiff's causes of action began to accrue on December 15, 2005 and February 2, 2006, Plaintiff's Complaint was timely filed on January 23, 2007.

B. Absolute Immunity

Prosecutors are immune from suit for damages under Section 1983 for "initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 424 U.S.409, 431 (1976). A prosecutor's duties "in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom, and are nonetheless entitled to absolute immunity." Buckley v. Fitzsimmons, 509 U.S. 259, 273-74 (1993) (citing Imbler, 424 U.S. at 431). However, any such actions by a prosecutor must include legal evaluation "of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.* Significantly, "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Id.* (citing Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973), cert. denied, 415 U.S. 917, (1974)). Therefore, if a prosecutor assumes the investigative roll, usually reserved for police officers, the prosecutor "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction." *Id.*

Defendants argue that the actions complained of in Plaintiff's Complaint "directly related to seeking indictments, the presentation of evidence to the grand-jury, the choice of witnesses to present the grand-jury, and decisions as to whether to dismiss indictments." Defendants contend that since these actions are prosecutorial in nature, they are entitled to absolute immunity under Imbler.

The Court rejects Defendants' conclusion. It is true, as conceded by Plaintiff, that some of the actions listed above by Defendants are included within the Complaint. Therefore, consistent with Imbler and Buckley Defendants would be immune from a Section 1983 damages suit for the same. However, Plaintiff's Complaint includes multiple allegations that Defendants Hodges and Burke fabricated criminal charges against Plaintiff before any Grand Jury was ever impaneled. Plaintiff's allegation is essentially that all Defendants in concerted action assumed the investigatory role of police officers. Accordingly, absolute immunity to suit cannot apply where Plaintiff's Complaint alleges actions by Defendants that fall outside the role of State's advocate. *See* Buckley, 509 U.S. at 276-78 (holding that prosecutor was not acting as an advocate when he held a press conference or allegedly fabricated evidence).

C. Damage to Reputation

The protections of the Due Process Clause, guaranteeing, *inter alia*, the right to procedural due process, only apply where interests within the Fourteenth Amendment's protection of liberty and property apply. Behrens v. Regier, 422 F.3d 1255, 1259 (11th Cir. 2005) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569 (1972)). Injury to one's reputation alone does not constitute deprivation of a liberty or property interest protected by the Fourteenth Amendment. McCray v. Howard, 285 Fed.Appx. 689, **4 (11th Cir. 2008) (citing Paul v. Davis, 424 U.S. 693, 701-02, 712 (1976)). Therefore, a plaintiff alleging injury to his or her reputation must "establish more than a mere defamation claim." *Id.* This requirement is the "Stigma-plus" test from Paul. *Id.*; *see* Paul, 424 U.S. at 701-702, 712. Specifically, a plaintiff must show damage to an interest protected by the Fourteenth Amendment in addition to the related injury to one's reputation. *Id.*

Defendant Burke argues simply that the allegations included in Count VIII of Plaintiff's Complaint, alleging injury to Plaintiff's reputation caused by Defendant Burke's statements to the media, are insufficient to establish a claim under Section 1983.

As noted by Plaintiff, Counts VII and X allege that Defendant Burke "participated in fabricating evidence" and that Defendant Burke along with Defendants Hodges and Paulk conspired, among other things, to do the same. It is well established in the Eleventh Circuit that "fabricating incriminating evidence violate[s] constitutional, rights." Riley v. City of Montgomery, Ala., 104 F.3d 1247, 1253 (11th Cir. 1997) (citing Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977)). Plaintiff alleges that Defendant Burke made the following statements: (1) "it is never free speech to assault or harass someone, no matter how much you don't like them[;]" and (2) "It would be ludicrous to say an individual has the right to go to someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming." These statements, if made, clearly relate to the alleged Fourteenth Amendment violation alleged by Plaintiff, i.e., violation of his right to be free from prosecution based upon false evidence/charges. Therefore, Plaintiff's allegations are sufficient to satisfy the Paul "Stigma-plus" standard.

D. Negligent Supervision

A Section 1983 claim cannot be maintained based upon a theory of respondeat superior. *See, e.g.*, Amnesty Intern. v. Battle, --- F.3d ----, 2009 WL 425050, *6 (11th Cir. 2009).

Defendant Hodges argues that a claim under Section 1983 cannot be maintained on the basis that a defendant is responsible under a theory of respondeat superior for the actions of another person. Defendant contends that Plaintiff must show that "the named defendant actually participated in the alleged constitutional violation, or exercised control or direction over the alleged violation." Additionally, Defendant argues that Plaintiff has not put forth sufficient allegations to show that constitutional violations were widespread.

Consistent with the legal standard espoused by Defendant Hodges, Plaintiff's Complaint, taken as true, is replete with allegations that Defendant personally participated in the alleged violations of Plaintiff's constitutional rights and/or exercised control or direction over Defendants Paulk and Burke to achieve said violations. Plaintiff also argues that the allegations included within his Complaint establish a claim of deliberate indifference in violation of Section 1983. Finally, contrary to Defendant Hodges's characterization that the alleged constutional violations were not widespread, Plaintiff alleges that "Mr. Paulk has testified that it is 'unfortunately' ***normal and common*** for him and other investigators employed by Dougherty County and working under the supervision of the District Attorney to testify without adequate knowledge or preparation or personal knowledge of the facts being attested to as true." (Doc. 1, ¶ 18) (emphasis added). Therefore, Plaintiff's claims against Defendant Hodges are not merely based upon a theory of respondeat superior.

E. Conspiracy

In the Eleventh Circuit, a heightened pleading standard is required for Section 1983 claims against defendants for whom qualified immunity is available as a defense. Swann v. Southern Health Partners, 388 F.3d 834, 838 (11th Cir. 2004); *but see* Shows v. Morgan, 40 F. Supp. 2d 1345, 1357-58 (M.D. Ala. 1999) ("[I]t is unclear whether the Eleventh Circuit § 1983 pleading standard is still constitutional"). A plaintiff making such a claim must "allege with some specificity facts which make out its claim." GJR Investments, Inc. v. County of Escambia, 132 F.3d 1359, 1367 (11th Cir. 1998). In Fullman v. Graddick, the Eleventh Circuit held:

> In civil rights and conspiracy actions, courts have recognized that more than mere conclusory notice pleading is required. In civil rights actions, it has been held that a complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory. In conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged. It is not enough to simply aver in the complaint that a conspir-

> acy existed. A complaint may justifiably be dismissed because of the conclusory, vague and general nature of the allegations of conspiracy.

739 F.2d 553, 556-57 (11th Cir. 1984).

Defendants first reiterate their claim that they are entitled to absolute immunity because they were acting within the scope of their authority as prosecutors; therefore, a claim of conspiracy will not dilute their immunity. Next, Defendants argue that Plaintiff's conspiracy claim is vague and conclusory.

Contrary to Defendants' contention, Plaintiff's conspiracy count (Count X) is well pleaded and satisfies the heightened pleading requirement of the Eleventh Circuit. Count X of Plaintiff's Complaint "repeats and incorporates the allegations of paragraphs 1 through 60" of Plaintiff's Complaint. Paragraphs 1 through 60 set forth detailed allegations of the wrongful conduct Plaintiff alleges and Count X of Plaintiff's Complaint explicitly alleges that the facts described in paragraphs 1 through 60 establish that Defendants Paulk, Burke, and Hodges acted in "concert" and "engag[ed] in a conspiracy." Defendant appears to contend that Plaintiff must use the word "agreement" specifically in his Complaint to proceed with a conspiracy claim. This is not so. As noted by Defendants, "[i]n conspiracy cases, a defendant must be informed of the nature of the conspiracy which is alleged." Fullman, 739 F.2d at 556-57. Plaintiff's detailed allegations and conspiracy count (Count X) more than satisfy this requirement.

F. Qualified Immunity

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Amnesty Int'l. USA, 2009 WL 425030 (citing Pearson v. Callahan, 129 S.Ct. 808, 815 (2009)). The Supreme Court has developed a two step analysis for use by courts to determine whether a defendant is entitled to qualified immunity. Saucier v. Katz, 533 U.S. 194, 201 (2001). First, the Court determines whether the Complaint, with Plaintiff's well-pleaded allegations accepted as true, alleges a violation of a constitutional right. Amnesty Int'l. USA, 2009 WL 425030. Second, if the Court finds that a constitutional right was violated, the Court must determine if these rights were "clearly established." *Id.* Although this two-step inquiry is no longer mandatory, the Court thinks it remains appropriate in this case. *See id.*

Defendant argues quite loosely that any purported violations of constitutional rights caused by their actions was not clearly established and a reasonable official in their position would not have had a "fair and clear" warning. To support this proposition Defendants argue that prosecutors are traditionally given "great latitude;" therefore, reasonable prosecutors would not have expected the actions alleged in this case to run afoul of the Constitution.

As noted above, Plaintiff's Complaint is replete with allegations of fabrication of evidence and improper instigation of criminal charges, e.g., issuance of fraudulent and illegal subpoenas. "[F]abricating incriminating evidence violate[s] constitutional rights." Riley, 104 F.3d at 1253. Furthermore, "[i]t was well established [as far back as] 1989 that fabricating incriminating evidence violated constitutional rights," *id.*–thus it was certainly well established that the same was constitutionally impermissible during the time frame of Plaintiff's allegations. The evidence obtained in and of itself was not fake or fabricated. It was the fake representation to the Grand Jury that the evidence supported the charges which themselves were not true as to Plaintiff. Defendants' Motion to Dismiss based on qualified immunity is **DENIED**.

Based on the above analysis, *see supra* Parts I.A.-F., Defendants' Motion to Dismiss (Doc. 5) is **DENIED**.

II. DEFENDANTS PAULK AND DOUGHERTY COUNTY'S MOTION TO DISMISS (Doc. 6)

Counts one, two, three, four, six, seven and ten allege wrongful conduct by Defendant Paulk, while Counts five and nine allege wrongful conduct by Defendant Dougherty County. Count I claims negligence on the part of Defendant Paulk. Count II claims negligence *per se* on the part of Defendant Paulk. Count III alleges that Defendant Paulk committed the tort of invasion of privacy by casting Plaintiff in a false light. Count IV alleges that Defendant Paulk committed the tort of invasion of privacy by intruding into Plaintiff's private affairs. Count V alleges a respondeat superior claim against Defendant Dougherty County for the negligence and torts committed by its employee, Defendant Paulk. Count VI alleges a Section 1983 claim against Defendant Paulk for malicious prosecution. Count VII alleges a Section 1983 claim against Defendant Paulk for instigating a retaliatory prosecution. Count IX alleges a Monell policy claim against Defendant Dougherty County pursuant to Section 1983. Finally, Count X alleges a conspiracy to violate Section 1983 and the constitutional rights of Plaintiff by Defendants Burke, Hodges, and Paulk in their individual capacities.

Defendants Paulk and Dougherty County proffer seven grounds for dismissal of Plaintiff's claims against them. First, Defendants argue that Plaintiff's claims are barred by the applicable two year statute of limitations. Second, Defendant Paulk contends that he is entitled to absolute immunity for any claims arising from his testimony before the grand jury. Third, Defendant Paulk argues that Plaintiff's conspiracy claim must fail because the "Intracoporate Conspiracy Doctrine" applies in this case and, notwithstanding the same, Plaintiff fails to state a claim for conspiracy. Fourth, Defendant Paulk argues that he is entitled to qualified immunity. Fifth, Defendant Paulk contends that he is entitled to official immunity as to Plaintiff's state law claims. Sixth, Defendant Dougherty County argues that Plaintiff's Monell policy claim must fail because it had no authority over Defendant Paulk. And finally, Defendant Dougherty County argues that it is entitled to Sovereign Immunity from Plaintiff's state law claims.

A. Statute of Limitations

Defendants Paulk and Dougherty County proffer the same argues concerning the applicable statute of limitations as Defendants Burke and Hodges. *Compare* (Doc. 5, Part III.B.) *with* (Doc. 6, Part III.B.). Therefore, Defendants Paulk and Dougherty County's arguments concerning the applicable statute of limitations fail for the same reasons that Defendants Burke and Hodges's arguments failed. *See supra* Part I.A.

B. Absolute Immunity

Government officials enjoy absolute immunity from Section 1983 suits for Grand jury testimony, even if the same was false. Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999). However, government officials may be liable for action taken prior to testifying before the grand jury in limited circumstances. *See* Mastroianni v. Bowers, 173 F.3d 1363, 1366-67 (11th Cir. 1999). The Eleventh Circuit has not resolved whether an exception to absolute immunity applies where the government official testifying before the grand jury is the complaining witness. Mastroianni, 173 F.3d at 1366 or 67 n. 1 (refusing to address whether an exception to absolute immunity would exist where the government official is the "complaining witness"); *but see* Jones, 174 F.3d at 1288 n. 10 (expressly rejecting an exception to the doctrine of absolute immunity even if the government official is the complaining witness).3

Defendant Paulk argues that under Mastroianni he cannot be held liable for his grand jury testimony, even if false. Defendant also contends that he cannot be held liable for any action leading up to the grand jury testimony because the doctrine of absolute immunity extends to all claims arising out of his grand jury testimony.

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[3] Whether a possible exception to the doctrine of absolute immunity exist has not been decided by the Eleventh Circuit, despite the language from the Jones opinion, because the holding by the Jones Court was dicta at best. In Jones it is not clear whether Detective Powers was in fact the complaining witness when he testified before the grand jury. The Jones Court only discussed the possibility that Powers could be construed as such. Therefore, the issue was not squarely before the Court.

Defendant's reliance on Mastroianni is slightly misplaced. In that case the government official, Yeoman, testified before the grand jury, an action for which Plaintiff Mastroianni conceded Yeoman was entitled to absolute immunity. However, Mastroianni argued that Yeoman was still liable for numerous acts allegedly committed in furtherance of a conspiracy to present false testimony before the grand jury convened. The Mastroianni Court held that Yeoman was not liable for any alleged pre-testimony conspiracy because the only evidence in the record to support such an inference was the substance of Yeoman's grand jury testimony. 173 F.3d at 1367. As the court explained, "we are prohibited from using Yeoman's grand jury testimony as a basis to impose civil liability."

The case at bar is distinguishable from Mastroianni in that this Court need not rely on the substance of Defendant Paulk's grand jury testimony to determine liability under Section 1983. Here, Plaintiff has alleged that Defendant Paulk fabricated evidence to instigate a criminal prosecution in addition to unlawfully exchanging subpoenaed documents for payment. In support of the same Plaintiff cites deposition testimony from Defendant Paulk, Barry McKinley, and others. This showing is sufficient to allow Plaintiff to survive Defendant Paulk's Motion to Dismiss (Doc. 6) on this claim.

C. Conspiracy

See supra Part I.E. for the law on conspiracy and the heightened pleading requirement in the Eleventh Circuit.

Initially, Defendant Paulk goes out on a limb and argues that Plaintiff's conspiracy claim (Count X) is precluded by the Intracorporate Conspiracy Doctrine. As Defendant explains, under the Intracorporate Conspiracy Doctrine, the employees of a corporation, acting as agents of the corporation, are incapable of conspiring amongst themselves. Dickerson v. Alachua County Commission, 200 f.3d 761, 767 (11th Cir. 2000). However, Defendant cites no authority to support the proposition that the Intracorporate Conspiracy Doctrine applies in noncoporate contexts, specifically in a District Attorney's Office. Therefore, the Court refuses to apply the Intracorporate Conspiracy Doctrine in this case and join Defendant out on the edge of the judicial tree branch in that Defendant essentially seeks to expand the definition of "intracorporate" beyond that clearly supported by the existing laws.

The remainder of Defendant's challenges against Plaintiff's conspiracy claim mimic the arguments made by Defendants Burke and Hodges. *Compare* (Doc. 5, Part III.E.) *with* (Doc. 6, Part III.C.2.). Therefore, Defendant Paulk's arguments concerning Plaintiff's conspiracy claim fail for the same reasons that Defendants Burke and Hodges's arguments failed. *See supra* Part I.E.

D. Qualified Immunity

See supra Part I.F. for the law on qualified immunity.

Defendant Paulk argues he is entitled to qualified immunity because "no case law has been discovered that would put Paulk on notice that his conduct was legally actionable." Contrarily, as noted above, "[i]t was well established [as early as] 1989 that fabricating incriminating evidence violated constitutional rights." Riley, 104 F.3d at 1253. Therefore, Defendant Paulk is not entitled to the protections of qualified immunity for any of Plaintiff's claims.

E. Official Immunity

Under Georgia law, public officers may be personally liable only for negligently performed ministerial acts or discretionary acts performed with malice or intent to injure. Dollar v. Grammens, 294 Ga. App. 888, 890 (2008). The doctrine of official immunity protects public officers from liability where they perform discretionary acts within the scope of their official authority and without wilfulness, malice, or corruption. *Id.* "The rationale for this immunity is to preserve the public employee's independence of action without fear of lawsuits and to prevent a review of his or her judgment in hindsight." *Id.* (citing Murphy v. Bajjani, 282 Ga. 197, 198 (2007)).

A "ministerial act" is one that is commonly "simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty." *Id.* On the other hand, a discretionary act is typically one that "calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. *Id.* The specific facts of an individual case determine whether an official's acts are ministerial or discretionary. *Id.* Additionally, "[t]he question whether a duty is ministerial or discretionary turns on the character of the specific act, not the general nature of the official's position." *Id.* Finally, "[w]hether an individual is entitled to official immunity is a question of law." *Id.*

Here, Defendant Paulk contends that all of the acts complained of my Plaintiff were discretionary acts, and the same were performed without malice and/or intent to injure Plaintiff.

Plaintiff contends first that Defendant Paulk's actions were ministerial in nature. In the alternative, Plaintiff contends that if Defendant's actions were discretionary acts, the same were committed with malice and/or intent to injure Plaintiff.

The actions Plaintiff complains of are Defendant Paulk's preparation and issuance of faulty subpoenas and Defendant's improper investigation. It is unclear from Georgia caselaw whether the preparation and issuance of subpoenas is a ministerial or discretionary duty for a district attorney's investigator. The most likely scenario is that the district attorney, or assistant district attorney, would either prepare the subpoena to be issued and provide it to the investigator or direct the investigator to the target of the desired subpoena, leaving the investigator to prepare and issue the same. It is unclear from Georgia caselaw or statutory law whether an investigator may *sua sponte* determine the target of an investigation and proceed accordingly. Contrarily, it is clear that where the target of an investigation is identified for an investigator, the investigator would likely use his/her discretion to determine the best approach to achieve the goals of the investigation.

The Court finds that Defendant Paulk is not entitled to official immunity for his allegedly wrongful acts. Despite the Court's inability to determine whether the preparation and issuance of subpoenas is a ministerial or discretionary duty for a district attorney's investigator, the Court finds that Plaintiff has sufficiently pleaded facts to support a claim that Defendant Paulk's allegedly wrongful acts were committed with malice and/or intent to injury Plaintiff. Concerning "malice" the Eleventh Circuit provided in Peterson v. Baker, 504 F.3d 1331, 1339 (11th Cir. 2007):

> [A]ctual malice requires a deliberate intention to do wrong and denotes express malice or malice in fact. That actual malice requires more than harboring bad feelings about another is well established. While ill will may be an element of actual malice in many factual situations, its presence alone cannot pierce official immunity; rather, ill will must also be combined with the intent to do something wrongful or illegal. As we understand it, malice in this context means badness, a true desire to do something wrong. In addition, actual intent to cause injury means an actual intent to cause harm to the plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury.

(Internal quotation marks and citations omitted). As provided in the Complaint, and admitted by Defendant during his deposition, the investigation was done as a "favor" for Phoebe. (Doc. 1, ¶ 35). Providing subpoenaed material solely for the use of a private party without regard to use of the same for official investigative purposes militates against Defendant. Therefore, Plaintiff has adequately alleged that Defendant Paulk acted with intent to cause harm as opposed to the proper reason for initiating a criminal investigation or issuing subpoenas.

F. Monell Policy Claim

In establishing the viability of a "Monell policy claim" the Supreme Court held in Monell that:

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels. As Mr. Justice Harlan, writing for the Court, said in Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613, 26 L.Ed.2d 142 (1970): Congress included customs and usages in § 1983 because of the persistent and widespread discriminatory practices of state officials. Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.

Even though local governing bodies can be sued directly under Section 1983, they cannot be held liable for the acts of officials they do not have authority to control. Turquitt v. Jefferson County, Ala., 137 F.3d 1285, 1292 (11th Cir. 1998). "A local government must have power in an area in order to be held liable for an official's acts in that area." *Id.* (quoting McMillian v. Johnson, 88 F.3d 1573 (11th Cir. 1996)). To determine if a local government has authority to control a government official, a court should look to the laws of the state in question to determine whom is charged with direct control of how the government official fulfills his duties. *See id.* (citing McMillian v. Monroe County, Ala., 520 U.S. 781, 789 (1997).

Defendant Dougherty County contends that it has no authority to control Defendant Paulk. Defendant cites O.C.G.A. § 15-18-14.1 to support it's argument.

In response, Plaintiff contends that O.C.G.A. § 15-18-14.1 does not define Defendant Paulk's employer as a matter of law, and the same "merely authorizes a district attorney to appoint investigators." Additionally, Plaintiff notes that there is no evidence in the record as to who "appointed Mr. Paulk, who paid his salary, who paid his secretary, who paid for his office, office supplies, and clerical support." Plaintiff also notes that his Complaint alleges that all of these things were done by Defendant Dougherty County.

Unfortunately for Plaintiff, the question the Court must answer under Monell and Turquitt is not "who legally employed the government official?". Instead the Court must determine who had authority to exercise supervisory and/or administrative control over the official. *See* Turquitt, 137 F.3d at 1292.

Here, O.C.G.A. § 15-18-14.1 is clear in that the district attorney has the authority to "appoint one investigator to assist the district attonrey in the performance of his or her official duties." O.C.G.A. § 15-18-14.1(a). Furthermore, any individual appointed under O.C.G.A. § 15-18-14.1(a) serves at the pleasure of the district attorney. O.C.G.A. § 15-18-14.1(b). And although there is an enumerated list of duties to be performed by an appointed investigator, O.C.G.A. § 15-18-14.1(c)(6) also provides that the investigator shall "[p]erform such other duties as are required by the district attorney." Based on the applicable Georgia statute, it is clear that the only person who had authority to control Defendant Paulk as an investigator was Defendant Hodges, as District Attorney. Therefore, Defendant Dougherty County had no authority to control Defendant Paulk. Accordingly, Defendants' Motion to Dismiss is **GRANTED** as to Count IX against Defendant Dougherty County.

G. Defendant Dougherty County's Sovereign Immunity

In response to Defendant Dougherty County's claims of sovereign immunity as to Plaintiff's state law claims, Plaintiff has withdrawn Count V ("Against Dougherty County----Respondeat Superior for the Negligence and Torts Committed By Its Employee James Paulk") of its Complaint. Due to Plaintiff's withdrawal of Count V, it is unnecessary for the Court to consider Defendant's arguments addressing the same. Additionally, Defendant Dougherty County's Second Supplemental Motion to Dismiss (Doc. 20), challenging Plaintiff's state law claim due to an alleged failure to provide the necessary *ad litem* notice pursuant to O.C.G.A. § 36-11-1, is **DENIED as MOOT**.

Based on the above analysis, *see supra* Parts II.A.-G., Defendants' Motion to Dismiss (Doc. 6) is **GRANTED-IN-PART**, as it relates to Count IX of Plaintiff's Complaint against Defendant Dougherty County, and **DENIED-IN-PART**, as it relates to all other arguments against Plaintiff's Complaint..

CONCLUSION

For the aforementioned reasons, Defendants Burke and Hodges's Motion to Dismiss (Doc. 5) is **DENIED**; Defendants Paulk and Dougherty County's Motion to Dismiss (Doc. 6) is **GRANTED-IN-PART, DENIED-IN-PART**; and Defendant Dougherty County's Second Supplemental Motion to Dismiss (Doc. 20) is **DENIED as MOOT**.

Only Counts V and IX of Plaintiff's Complaint alleged wrongful action on the part of Defendant Dougherty County. Because Count V was withdrawn by Plaintiff and Count IX was dismissed by the Court, **Defendant Dougherty County** is hereby **ORDERED TERMINATED** from this action.

SO ORDERED, this 30th day of March, 2009.

/s/W. Louis Sands

THE HONORABLE W. LOUIS SANDS,
UNITED STATES DISTRICT JUDGE

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 10-788

FEB 1 - 2011

In The
Supreme Court of the United States

◆

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III,
AND KELLY R. BURKE,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

◆

PAULK'S BRIEF IN OPPOSITION

◆

JOHN C. JONES
Attorney at Law
248 Roswell Street
Marietta, Georgia 30060
770-427-8066
jcjones1234@bellsouth.net

Counsel for Respondent James P. Paulk

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether Petitioner has presented a compelling reason to grant the Petition, where no court including the Eleventh Circuit has addressed the issue of a complaining witness being directed to testify regarding matters unknown to him at the direction and control of the District Attorney.

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PROCEEDINGS BELOW

Petitioner filed a ten count civil action, *Rehberg v. Paulk*, No. 1:07-CV-22 (WLS) (M.D. Ga. Jan. 23, 2007), against two District Attorneys (Hodges and Burke) and an investigator (Paulk) employed and controlled by them. Petitioner sought Federal causes of action against Hodges and Paulk for alleged malicious prosecution under 42 U.S.C. §1983 and violations of his Fourth and Fourteenth Amendment rights (Count 6); retaliatory prosecution under 42 U.S.C. §1983 against Hodges and Paulk (Count 7); and conspiracy to violate those rights against Hodges, Paulk and Burke (Count 10). Petitioner also claimed causes of action against Paulk under Georgia law.

Respondent Paulk moved to dismiss the Federal claims pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court denied that motion. App. 83a. An interlocutory appeal was then pursued. The Eleventh Circuit reversed in part and dismissed Count 6 against Hodges and Paulk based upon testimonial immunity before the grand jury as well as qualified immunity; dismissed Count 7 based upon qualified immunity; and dismissed Count 10 as a matter of law. The Court failed to dismiss the retaliatory prosecution claim under Count 7 and remanded that claim as well as the state law claims for further proceedings. App. 44a.

◆

STATEMENT OF THE CASE

Petitioner focuses narrowly on Paragraph 17 of the complaint, *Rehberg v. Paulk*, No. 1:07-CV-22 (WLS) (M.D. Ga. Jan. 23, 2007) as well as language in the Eleventh Circuit's opinion, App. 4a, for the proposition that Paulk was the complaining witness before the grand jury. He omits the allegations critical to the "compelling reason" for denying the *Writ of Certiorari*. Notably, the allegations reveal that Paulk had no prior knowledge of the specific charges against the Petitioner before appearing before the grand jury and "testified" as to the information provided to him by the District Attorney. Petitioner asserts:

> Mr. Paulk has admitted that he lacked "preparation and knowledge." He has admitted that he had no evidence that Mr. Rehberg had committed an aggravated assault, assault or burglary.

Compl. ¶ 105.

> In the original indictment for aggravated assault and burglary, Mr. Paulk is listed as the complainant. Mr. Paulk has admitted that he was the only witness who served in such a role before the grand jury in the original indictment for aggravated assault and burglary against Mr. Rehberg.

Compl. ¶ 112

> Mr. Hodges (District Attorney) knew or should have known that there was no probable cause to indict Mr. Rehberg on charges of aggravated assault and burglary, *yet he*

> *directed Mr. Paulk to appear before the grand jury and to attest to the truth of such charges.* Mr. Hodges is not entitled to absolute immunity for such actions. Mr. Hodges was not acting as a prosecutor or advocate for the state. He is not entitled to the protections of absolute immunity while functioning in such capacity.

Compl. ¶ 113.

> During the investigation of Mr. Rehberg before any grand jury had been impaneled and before Mr. Burke[1] was acting in his role as advocate for the State, Mr. Burke participated in fabricating evidence that Mr. Rehberg had committed an aggravated assault and burglary. There is no evidence that Mr. Rehberg ever committed a burglary or aggravated assault on anybody. Yet Mr. Burke in his investigation participated in fabricating such evidence.

Compl. ¶ 134

> *Mr. Burke then called Mr. Paulk to testify on short notice as the complaining witness before the grand jury and attest to the truth of the charges that Mr. Rehberg had committed a burglary and aggravated assault.* Mr. Burke knew that he and Mr. Paulk in conducting

---

[1] The District Attorney of Dougherty County was Kenneth B. Hodges, III who recused himself from the investigation and indictment. District Attorney Kelly R. Burke was appointed as a special prosecutor by the Attorney General. App. 4a.

> the investigation of Rehberg had not found any evidence that Mr. Rehberg committed a burglary or aggravated assault. *While Mr. Burke's presentation of evidence to the grand jury may be entitled to absolute immunity as the prosecutor*, his role in investigating Mr. Rehberg and fabricating evidence of a burglary and aggravated assault are not entitled to absolute immunity. (Emphasis supplied)

Compl. ¶ 135.

While the complaint is indefinite on the issue, the allegations appear to claim two separate investigations: (1) the subpoena of telephone records from BellSouth, Alltel and Sprint by Paulk in an effort to determine the origin of unsolicited faxes, Compl. ¶ 37; and (2) the aggravated assault and burglary charges prepared by Burke and Hodges. Compl. ¶¶ 113, 134. Without any knowledge of the results of Burke and Hodges' investigation, Paulk was allegedly directed by both men to appear before the grand jury and present the results of their aggravated assault and burglary investigation. The complaint vividly illustrates this point:

> Mr. Paulk's negligent performance of his ministerial duties include, but are not limited to, the following: . . . (iii) on multiple occasions he attested to the truth of "facts" as a complaining witness before a grand jury to which "facts" he had no knowledge and concerning matters that he had never investigated.

Compl. ¶ 63.

While it is alleged that the two District Attorneys supplied Paulk with the false information that was presented to the grand jury, there is no contention that Paulk knew the information was false or committed perjury with its presentation. The Eleventh Circuit recognized this anomaly, but still addressed his immunity "even if" Paulk knew that his testimony before the grand jury was false. App. 12a. With the holding of absolute immunity for the "complaining witness" for false testimony before the grand jury, the Eleventh Circuit's immunity encompassed a witness offering what he believed to be truthful evidence supplied and directed by the District Attorney when that District Attorney also appeared as a witness. Paulk became the surrogate for alleged false testimony supplied by the District Attorneys and no circuit has squarely addressed that issue. Simply put, Petitioner has alleged a unique fact pattern wherein there are no "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

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REASONS FOR DENYING THE PETITION

Petitioner advances two flawed arguments in his brief. He first contends that Paulk was the complaining witness and perjuriously initiated the false prosecution against the Petitioner (*See* Petition, p. 7). He also argues that the federal courts of appeal are deeply divided as to whether complaining witnesses are exempt from the absolute immunity enjoyed by witnesses in grand jury and other judicial proceedings. Petitioner's arguments have little merit.

A. Paulk Did Not Commit Perjury Before the Grand Jury

Perjury is defined as the "willful assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding . . . and known to such witness to be false." Black's Law Dictionary revised 4th Edition. Under the Official Code of Georgia Annotated, §16-10-71,[3] the same knowing and willful requirement is mandated for that charge. The complaint demonstrates conclusively that if false testimony was provided by Paulk, it was neither willful nor knowing:

> Dougherty County and the District Attorney's Office knew or should have known that (1) it was the common custom and practice of investigators to serve as complaining witnesses, and that (2) County investigators were doing so without adequate supervision, notice, preparation or knowledge.

Compl. ¶ 148.

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[3] O.C.G.A. §16-10-71(a) A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgment of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.

> Mr. Paulk has testified that it is "unfortunately" normal and common for him and other investigators employed by Dougherty County and working under the supervision of the District Attorney to testify without adequate notice, knowledge or preparation or personal knowledge of the facts being attested to as true.

Compl. ¶ 152

The facts presented to Paulk by the two District Attorneys may have been false, but being the conduit of that information to the grand jury fails to change his testimony into perjury.

Overlooked as well by the Petitioner is the assertion that both District Attorneys were present in the grand jury with Paulk and presented this evidence and permitted the testimony to be heard by the grand jury. Since they were the guiding force and only they allegedly knew the information to be false, the issue is really one of absolute prosecutorial immunity pursuant to *Imbler v. Pachtman,* 424 U.S. 409, 96 S. Ct. 984 (1976) and *Burns v. Reed,* 500 U.S. 478, 111 S. Ct. 1934 (1991) since proceedings before the grand jury are considered to be "intimately associated with the judicial phase of the criminal process" *Id.* at 430. Both District Attorneys would have immunity for this conduct under existing law.

The evidence discovered by the District Attorneys prior to the indictments of the Petitioner has yet to be fleshed out since only the barest allegations in a complaint are before the district court and discovery has yet to begin. With such a scant record there is no "compelling reason" to consider the issue at this juncture.

B. No Split in the Circuits Exists Where the Complaining Witness Testifies From the Facts Supplied by the District Attorney

Petitioner makes a significant overreach in his claim that the Eleventh Circuit's holding conflicts with the decisions of the Second, Fifth, Sixth, Seventh, Ninth, Tenth and the District of Columbia Circuits. He implies that each of these circuits has carved out the "complaining witness" exception for knowingly false grand jury testimony when only two circuits, the Second in *White v. Frank*, 855 F.2d 956 (1988) and the Ninth Circuit in *Harris v. Roderick*, 126 F.3d 1189 (1997) have done so. Indeed, in *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501 (5th Cir. 1992) and *Teko v. Hingle*, 318 F.3d 639 (5th Cir. 2003), the focus was on whether a prosecutor and a complaining witness had absolute immunity in a *probable cause hearing* rather than a grand jury proceeding. That court cited *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986) and *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502 (1997) and concluded that seeking an indictment is removed from the judicial phase of criminal proceedings.

In the Sixth Circuit case of *Vakilin v. Shaw*, 335 F.3d 509 (2003), Shaw was the complaining witness before a judge in an effort to obtain an arrest warrant. The Court saw Shaw as performing the same function as the prosecutor in *Kalina* and denied absolute immunity. While the term "complaining witness" was present, the grand jury was not. The cases of *Curtis v. Bembenek*, 48 F.3d 281 (7th Cir. 1995), *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) and *Edmond v. U.S. Postal Ser., Gen. Counsel*, 949 F.2d 419 (D.C. Cir. 1991) all recognize a distinction between a complaining witness and an ordinary witness, but the Eleventh Circuit was correct in its analysis that only the Second Circuit and Ninth Circuits have carved out a complaining witness exception to absolute immunity for false grand jury testimony. App. 14a, n. 9.

In contrast, the Third, Fourth, and Eleventh Circuits have confronted the "complaining witness" perjury issue before the grand jury directly and applied this Court's rationale for granting absolute immunity. *Knight v. Tortz*, 157 Fed. App'x 481 (3rd Cir. 2005) (*per curiam*); *Lyles v. Sparks*, 79 F.3d 372 (4th Cir. 1996); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988); and *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999). The import of this analysis is the realization that the Eleventh Circuit has broken no new ground with its holding here since it relied upon its precedent of more than twenty years and reaffirmed that holding in *Jones* eleven years later. The last circuit addressing the issue directly occurred in 1997 in *Roderick*. No new circuit split has occurred in more than four years.

While there may be a split in the circuits regarding perjury of a complaining witness before a grand jury, there is no split regarding an individual appearing before the grand jury who merely reads a report or provides testimony supplied to him by the District Attorney. Indeed, no case cited by the Petitioner or discovered by Respondent directly addresses this issue. While it may be speculated that such may be the result of prosecutorial misconduct, this Respondent is not responsible for the actions of his employer.

At common law, prosecutors were immune to suits for malicious prosecution and for defamation. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934 (1991). When only the prosecutor is aware of the nature and accuracy of the testimony being offered, it is incongruous to fail to award that same immunity to the unknowing witness.

◆

CONCLUSION

Based upon the foregoing, the Petitioner has presented no compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted, this 1st day of February, 2011.

JOHN C. JONES
Counsel for Respondent
James P. Paulk
State Bar No. 401250
248 Roswell Street
Marietta, Georgia 30060
(770) 427-8066

REPLY
BRIEF

RECORD
AND
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No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III,
AND KELLY R. BURKE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street, Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATUTE

42 U.S.C. § 1983 .... *passim*

REPLY BRIEF FOR PETITIONER

Respondent Paulk recognizes that the courts of appeals are divided regarding whether, in an action under 42 U.S.C. § 1983, a complaining witness is absolutely immune from damages liability when the claim is based on false grand jury testimony. And he does not dispute that the issue of complaining witness immunity arises with great frequency in the lower courts. See Pet. 16-17. Moreover, respondent does nothing to challenge or even address the arguments advanced by amicus Government Accountability Project confirming the importance of the question presented.

Respondent argues only that certiorari should be denied because he did not know that his statements were false when he testified before the grand jury. That, according to respondent, means that petitioner cannot prevail on his Section 1983 claim and makes this case a poor vehicle for resolving the conflict among the lower courts. But the complaint amply alleges respondent's knowing and culpable participation in a malicious prosecution in violation of petitioner's constitutional rights, and that is all that is relevant at the motion to dismiss stage.

Respondent's related attempt to gerrymander the lower court decisions to fit his "innocent false testimony" theory is similarly unavailing—the facts here squarely present the conflict among the courts of appeals. Because this case is an ideal vehicle for this Court to resolve the clear conflict among the lower courts regarding application of the complaining witness rule to false testimony, review by this Court is plainly warranted.

A. The Complaint Properly Alleges A Section 1983 Claim Based On Malicious Prosecution.

1. Respondent asserts that in testifying before the grand jury he was no more than an innocent "surrogate" or "conduit" for false information given to him by the prosecutors. Opp. 5-7. Because the case was decided below on a motion to dismiss, however, it is the allegations of the complaint—not the assertions in respondent's brief in opposition—that are controlling. See, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

The court of appeals stated that the complaint "alleges that * * * Hodges and Paulk *knew there was no probable cause* to indict him, and therefore they got together *with malice*, fabricated evidence (i.e., Paulk's false testimony), and decided to present that fabricated evidence to the grand jury." Pet. App. 11a (emphasis added). That is dispositive of respondent's argument.

Certainly there is no basis for challenging the court of appeals' interpretation of the complaint. The complaint alleges that "[a]cting as investigators, Mr. Paulk and Mr. Hodges instituted an investigation of Mr. Rehberg and then instigated criminal indictments of Mr. Rehberg *with malice and without probable cause.*" Compl. ¶ 99 (emphasis added). It further states that "[p]robable cause never existed for any of the charges alleged against Mr. Rehberg. Yet he was the subject of an extensive illegal investigation conducted as a political favor." Compl. ¶ 29. Indeed, respondent admitted that his investigation was a "favor" to the hospital, and "[o]ther witnesses have confirmed Mr. Paulk's admission that he was doing [the hospital] a favor by investigating Mr. Rehberg."

Compl. ¶ 35. And respondent himself "admitted that he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary." Compl. ¶ 17. These specific factual allegations easily support a plausible inference that respondent's testimony was knowingly and maliciously false. *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Respondent's contrary construction of the complaint rests on allegations that are not part of the Section 1983 malicious prosecution claim that is the subject of this petition. For example, respondent relies on a paragraph of the complaint that is part of a separately pleaded state law negligence claim against Paulk. Opp. 4 (quoting Compl. ¶ 63 in Count One).[1] But it is axiomatic that a civil plaintiff may plead alternative and even inconsistent theories of relief. See, *e.g.*, *United Techs. Corp.* v. *Mazer*, 556 F.3d 1260, 1273-1274 (11th Cir. 2009) (citing Fed. R. Civ. P. 8(d) and noting that a "complaint is not subject to dismissal simply because it alleges that both [defendant and another person] committed the tortious conduct, even if it would be impossible for both to be simultaneously liable"). Allegations relating to other counts of the complaint are therefore wholly irrelevant in interpreting the Section 1983 claim at issue here.

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[1] Respondent similarly quotes other provisions of the complaint that neither are a part of the malicious prosecution claim (Count Six) nor even assert any claims at all against respondent. See Opp. 3-4 (quoting Compl. ¶¶ 134-135, which asserts a claim solely against respondent Kelly Burke under Count Eight); Opp. 6-7 (quoting Compl. ¶ 148 and ¶ 152, which pertain to Count Nine that was asserted against respondent Ken Hodges and Dougherty County, but that was *not* asserted against Paulk). Count Six of the complaint includes only ¶¶ 1-60 by incorporation and ¶¶ 96-120 by direct allegation.

2. Moreover, even if the complaint did not allege that respondent knew his testimony was false—and therefore failed to allege criminal perjury, as respondent claims (Opp. 6)—that would not render petitioner's Section 1983 claim defective.

The appropriate inquiry for a federal malicious prosecution claim is whether the defendant acted with malice and without probable cause. See *Kjellsen* v. *Mills*, 517 F.3d 1232, 1237 (11th Cir. 2008) ("To prove a § 1983 malicious prosecution claim, under federal law and Georgia law, a plaintiff must show the following: '(1) a criminal prosecution instituted or continued by the present defendant; (2) *with malice and without probable cause*; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused.'" (emphasis added) (quoting *Wood* v. *Kesler*, 323 F.3d 872, 881-882 (11th Cir. 2003))). The allegations detailed above plainly satisfy these requirements.

In sum, respondent does not dispute that his testimony was false and respondent is wrong in asserting that the complaint does not sufficiently allege his awareness of its falsity. This case therefore presents an ideal vehicle for this Court to resolve the disputed question whether the complaining witness exception applies to judicial testimony, such as testimony before a grand jury.

B. Respondent Wrongly Characterizes The Circuit Court Split And Its Application To This Case.

Respondent recognizes that the federal courts are divided about the applicability of the complaining witness exception to judicial testimony in general and to grand jury testimony in particular.

He contends that these cases are inapposite because they do not involve a witness who "[t]estifies [f]rom the [f]acts [s]upplied by the District Attorney." Opp. 8. But, as set forth above, this case does not involve an innocent complaining witness; the complaint properly and plausibly alleges respondent caused petitioner to be indicted maliciously and without probable cause. Moreover, none of the cases relies on respondent's distinction between knowingly false testimony and "innocent" false testimony in determining the availability of absolute immunity, further demonstrating the irrelevance of respondent's argument to whether this Court should grant review.

In addition, respondent attempts to disguise the extent of the division among the lower courts by asserting that "only the Second Circuit and Ninth Circuits [*sic*] have carved out a complaining witness exception to absolute immunity for false grand jury testimony." Opp. 9. In fact, four more circuits have recognized that the complaining witness exception to absolute immunity applies in the grand jury context. See *Cervantes* v. *Jones*, 188 F.3d 805, 809-810 (7th Cir. 1999), overruled on other grounds by *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001); *Enlow* v. *Tishomingo Cnty., Miss.*, 962 F.2d 501, 511 (5th Cir. 1992); *Anthony* v. *Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 419, 423 (D.C. Cir. 1991).

This is to say nothing of the additional circuit court decisions that divide over whether the complaining witness exception should extend to judicial proceedings outside the grand jury context. Compare, *e.g.*, *Moldowan* v. *City of Warren*, 578 F.3d 351, 390

(6th Cir. 2009) (declining to apply the complaining witness exception to immunity for trial testimony), with *Harris* v. *Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997) (applying the complaining witness exception to immunity for trial testimony). See also Pet. 11-13 (discussing this divergence among cases).

As noted in the petition, this division among the courts of appeals stems from the tension between this Court's decisions in *Malley* and *Briscoe* and will persist until this Court clarifies the relationship between those two precedents. Until then, these Section 1983 claims will be resolved differently depending on where the lawsuit is filed. This Court should grant review to eliminate this disparate treatment of similarly situated litigants.

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street, Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

FEBRUARY 2011

AMICUS
CURIAE
BRIEF

JAN 1[illegible] 2011

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CHARLES A. REHBERG,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF GOVERNMENT ACCOUNTABILITY PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DAVID W. SANFORD
KYLE CHADWICK
SANFORD WITTELS & HEISLER, LLP
1666 Connecticut Avenue NW
Suite 310
Washington, DC 20009
(202) 742-7780

RICHARD E. CONDIT
Counsel of Record
MARK P. COHEN
GOVERNMENT ACCOUNTABILITY
PROJECT
1612 K Street NW,
Suite 1100
Washington, DC 20006
(202) 474-1000
MarkC@whistleblower.org

Counsel for Amicus Curiae

234319

COUNSEL PRESS
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MOTION OF GOVERNMENT ACCOUNTABILITY PROJECT FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The Government Accountability Project (GAP) hereby moves, pursuant to S. Ct. R. 37.2, for leave to file a brief amicus curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. GAP is filing this motion because we have been unable to secure consent from all Respondents.* The proposed brief is attached.

As more fully explained in the Statement of Interest of Amicus Curiae beginning on page 1 of the attached brief, GAP is the nation's foremost civil and human rights organization representing the interests of whistleblowers before the courts and Congress. Accordingly, GAP has a particular interest in cases such as this that involve unlawful and oppressive initiation of criminal proceedings by government officials against individuals who attempt to expose wrongdoing. Although GAP cannot point to statistics to document such a trend, GAP has noted a distressing increase in such cases in recent years.

GAP's brief will assist the Court in determining whether to grant certiorari because the brief highlights the importance of 42 U.S.C. § 1983 in remedying and deterring such oppressive government conduct—which, significantly, both violates and chills the future exercise of fundamental constitutional rights—and the concomitant importance of affording this deterrence function due weight when considering whether law enforcement officers should be absolutely immune from suit under Section 1983 when they give maliciously false testimony as complaining witnesses before grand juries.

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* Petitioner has written to GAP expressing its consent. GAP sent a letter requesting consent via e-mail to counsel for Respondents on January 4, 2011. As of this date, Respondents Kenneth B. Hodges, III, and Kelly R. Burke have sent a letter not objecting, but we have not as yet heard from Respondent James P. Paulk.

Accordingly, GAP respectfully requests that the Court grant leave to file the attached brief as amicus curiae.

RICHARD E. CONDIT
Counsel of Record
MARK P. COHEN
GOVERNMENT ACCOUNTABILITY
PROJECT
1612 K Street NW,
Suite 1100
Washington, DC 20006
(202) 474-1000
MarkC@whistleblower.org

DAVID W. SANFORD
KYLE CHADWICK
SANFORD WITTELS & HEISLER, LLP
1666 Connecticut Avenue NW
Suite 310
Washington, DC 20009
(202) 742-7780

Counsel for Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Government Accountability Project (GAP) is a nonpartisan, nonprofit civil and human rights organization specializing in legal advocacy on behalf of government and corporate whistleblowers who expose illegality, gross waste or mismanagement, abuse of authority, significant threats to public health or safety, or other institutional misconduct detrimental to the public interest. Founded in 1977, GAP is the nation's leading organization devoted to these purposes. The vast majority of GAP's financial support comes from over 10,000 individual donors and from institutions such as the Carnegie Foundation, CS Fund, Ford Foundation, Open Society Institute, and Rockefeller Family Fund. Other funding sources include attorney fees and settlement awards.

GAP attorneys have testified before Congress about the effectiveness of federal statutory protection for whistleblowers, filed numerous amicus curiae briefs on constitutional and statutory issues affecting whistleblowers, and played a leading role in support of the passage of landmark legislation including the Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (1989), the 1994 amendments to that Act, and the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given at least 10 days' notice of amicus' intention to file this brief.

When GAP participates in litigation as amicus curiae, it brings to bear a broad perspective informed by decades of involvement in a wide range of legal issues affecting whistleblowers. GAP's interest in this case arises because the Petition indicates that Petitioner is a legitimate whistleblower. He complained about unethical billing practices at a hospital. For his effort, Petitioner was wrongfully and maliciously investigated and prosecuted by the local District Attorney's Office, apparently at the urging of powerful local interests to whom the Office was favorably inclined or politically indebted. Although all three grand jury indictments were eventually dismissed, the trauma and expense of fighting incarceration are particularly chilling in themselves and will no doubt discourage others from reporting wrongdoing.

While GAP cannot point to empirical data of this particular trend, we have seen a significant rise in the use of criminal investigation and prosecution in retaliation for legitimate whistleblowing. This trend threatens to undermine the protections provided by state and federal whistleblower laws, as well as state and federal constitutional guarantees of freedom of speech. Especially because current law affords prosecuting attorneys absolute immunity from suit under 42 U.S.C. § 1983 for many acts in furtherance of malicious prosecutions, GAP considers it essential to the integrity of the American system of justice to safeguard and expand access to civil remedies against individuals who participate in such unconstitutional and oppressive schemes as perjurious complaining witnesses.

SUMMARY OF THE ARGUMENT

This Court has recognized that *deterring* unconstitutional conduct is among the core purposes of 42 U.S.C. § 1983. The deterrence interest is especially strong where, as in the case, the wrongful conduct will, if unremedied, chill the future exercise of rights by members of the public other than the claimant. Petitioner is a forensic accountant and whistleblower who threatened powerful interests in his community simply by releasing information that he believed evidenced unethical billing practices at Phoebe Putney Memorial Hospital in Albany, Georgia. A grand jury erroneously indicted him three times on the basis of retaliatory, perjured testimony by Respondent James P. Paulk, the Chief Investigator for the Office of the District Attorney for Dougherty County, Georgia.[2] The Eleventh Circuit's decision, holding Respondent absolutely immune from suit under Section 1983 for violating Petitioner's right to be free from unreasonable seizures, renders Petitioner and others who may be unpopular with state or local officials less secure in the exercise of their rights because it denies them a means to deter abuses of the justice system. In addition to the reasons given in the Petition, the Court should grant certiorari to ensure that Section 1983's deterrence function is taken fully into account in establishing the circumstances in which malicious complaining witnesses can be held liable in damages.

---

[2] While there are three Respondents, we will refer to Mr. Paulk simply as "Respondent" because the Petition concerns only his liability.

ARGUMENT

Congress enacted the legislation now codified at 42 U.S.C. § 1983 in 1871 at the urging of President Ulysses S. Grant. See *Monroe v. Pape*, 365 U.S. 167, 172-173 (1961), *overruled in part by Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The constitutional tort action was designed "not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (citing *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey v. Piphus*, 435 U.S. 247, 256-257 (1978)); see also Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. Pa. L. Rev. 755, 760 (1992) (identifying "deterrence and compensation" as twin goals of Section 1983); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 59 (stating that one purpose of Section 1983 is "to deter violations of the Fourth Amendment").

Since *Tenney v. Brandhove*, 341 U.S. 367 (1951) (recognizing absolute legislative immunity), the Court has construed Section 1983 as incorporating immunities and defenses that existed under common law when the statute was passed. The Court determines a defendant's degree of immunity from suit primarily by analyzing the defenses that could be asserted in 1871 by a tort defendant who performed the same "function" under color of law. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Even if a person performing that function was not liable at common law, however, the Court will "consider[] whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower* *v. Glover*, 467 U.S. 914, 920 (1984); see also *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("[W]e do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.").

There is a heavy presumption that a state actor can claim only qualified immunity. See, e.g., *Burns v. Reed*, 500 U.S. 478, 486-487 (1991); *Forrester v. White*, 484 U.S. 219, 230 (1988). Qualified immunity turns on proof of the official's objective good faith and "provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Absolute immunity from suit, by contrast, is "strong medicine" warranted only by the most compelling of policy concerns embedded in the common law. *Forrester*, 484 U.S. at 230 (quoting *Forrester v. White*, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)). The Court has accordingly "been quite sparing in [its] recognition of absolute immunity, and ha[s] refused to extend it any further than its justification would warrant." *Burns*, 500 U.S. at 486-87; *Butz v. Economou*, 438 U.S. 478, 506 (1978) ("[Officials who] seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.").

The Court has reserved absolute immunity under Section 1983 for persons sued for violations committed in the performance of legislative, judicial, or quasi-judicial functions. See, e.g., *Superior Ct. of Va. v. Consumers Union*, 446 U.S. 719, 733-734 (1980) (holding state supreme court justices absolutely immune for adopting state bar code, a legislative function); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (holding judges absolutely immune from suit "for acts committed within their judicial jurisdiction"); *Buckley*, 509 U.S. at 274 (holding prosecutors entitled only to qualified immunity for prearrest investigative acts). In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court held that state prosecutors partake of absolute judicial immunity for violating criminal defendants' constitutional rights in "initiating a prosecution [or] presenting the State's case." *Id.* at 430. The *Imbler* Court determined that filing charges and trying cases, although acts performed in the executive branch, are acts "intimately associated with the judicial phase of the criminal process" and, moreover, did not give rise to liability on the part of prosecutors for damages under the common law. *Id.* The Court further held that absolute immunity was justified on policy grounds, as civil lawsuits could distract prosecutors from law enforcement and cause them to hesitate to bring cases, or hesitate to drop them where doing so might cast doubt on the original decision to prosecute. *Id.* at 425-427.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983)—the authority upon which the Eleventh Circuit held Respondent absolutely immune—the Court held that a police officer who gave perjured testimony at a criminal trial was entitled to the absolute quasi-judicial immunity recognized in *Imbler*, because the common law of 1871 deemed witnesses to be as "integral [a] part[] of the judicial process" as the prosecutors who elicit their testimony, and similarly protected the witnesses from post-trial suits for damages. *Id.* at 340. Notably, the *Briscoe* Court recognized "some force" in arguments that police officers should receive only qualified immunity, as they are uniquely important and compelling witnesses who are much less likely than ordinary citizen witnesses to be intimidated into favoring the defendant by the prospect of damages suits—to which their employers will mount the defense—or, on the other hand, to be indicted by the state and local prosecutors with whom they work on a daily basis for giving perjured testimony in favor of conviction. *Id.* at 341-342. But the Court found these considerations outweighed by the same concerns about potential litigation burdens and skewing of law enforcement decisions that justified absolute immunity for the prosecutor in *Imbler*. *Id.* at 343.

Petitioner, supported by the law of seven Circuits, contends (Pet. 22) that the level of Respondent's immunity for his perjured grand jury testimony is governed not by *Briscoe*, but by *Malley*. The Court held in *Malley* that a police officer acting as a complaining witness in seeking an arrest warrant could claim only qualified immunity, because "[c]omplaining witnesses were not absolutely immune at common law," and applying for an arrest warrant is insufficiently similar, in any event, to the act of a prosecutor seeking an indictment to fall within the absolute immunity rule of *Imbler*. 475 U.S. at 340-344; see also *Kalina v. Fletcher*, 522 U.S. 118, 120, 129-131 (1997) (holding prosecutor not absolutely immune for executing affidavit in support of arrest warrant as complaining witness). GAP fully agrees that under this Court's established approach to Section 1983 immunity, *Malley*'s holding that the common law had no analogue to absolute immunity for complaining witnesses means that Respondent is not absolutely immune from suit. See, e.g., *Malley*, 475 U.S. at 340 (noting that the Court's threshold inquiry is whether the claimed immunity existed at common law); *Tower*, 467 U.S. at 920 (same).

Strong policy considerations likewise support affording Respondent only qualified immunity. Cf. *id.* (noting that

"§ 1983's history or purposes" may support denial of an immunity even if it existed at common law). Those same considerations support granting the Petition to establish uniformity among the Circuits on this significant issue.[3] Petitioner observes (Pet. 22-23) that the policy grounds cited in *Briscoe* in favor of absolute immunity for ordinary law enforcement witnesses in judicial proceedings do not apply to complaining witnesses. Complaining witnesses have voluntarily given evidence as part of setting the criminal process in motion and have shown a personal or professional interest in the outcome. Given the gravity of those steps and the careful reflection that should precede them, the possibility that a complaining witness might be liable in damages to the accused under Section 1983 for testifying falsely and maliciously is extremely unlikely to deter desirable law enforcement conduct. Cf. *Malley*, 475 U.S. at 343 (noting that "reflection" by "an officer [seeking an arrest warrant] who knows that objectively unreasonable decisions may be actionable" is "desirable").

Indeed, the deterrence function of tort law in general, and Section 1983 in particular, takes on special importance in malicious and retaliatory prosecution cases, and weighs heavily against granting absolute immunity from suit. Affording absolute immunity to prosecutors and other law enforcement officers for violating civil rights in criminal proceedings unquestionably comes at the steep price of "leav[ing] the genuinely wronged defendant without civil redress against [one] whose malicious or dishonest action deprives him of liberty." *Imbler*, 424 U.S. at 427; see also *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949) (L. Hand, J.). This case vividly illustrates another, often overlooked cost of absolute immunity for quasi-judicial actors—namely, the oppressive and chilling effects upon citizens at large that result from the inability of the injured parties to obtain justice and thereby deter repetition of the wrongs.

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[3] The Third, Fourth and Eleventh Circuits, which do not recognize the complaining witness exception to the absolute immunity of witnesses in judicial proceedings (see Pet. 14-15), together sit in review of district courts in ten states and the United States Virgin Islands.

Justice Robert Jackson warned, while serving as Attorney General, that the power to initiate criminal proceedings poses the greatest danger to rights when "law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." See *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940). Petitioner fell victim to such a vendetta. He was targeted for indictment in apparent retaliation for his attempt to expose unethical practices at a prominent local institution. The trauma and expense of being illegitimately charged with three crimes is significant, even if the indictments are eventually dismissed. If Petitioner cannot hold Respondent or the prosecutors accountable, other potential whistleblowers in the community will no doubt be discouraged by the prospect that officials may with impunity take similar steps against them. Speech on matters of public interest will be chilled, and fundamental constitutional protections diminished.[4]

When appropriate weight is given to Section 1983's purpose of *deterring* constitutional violations, in the interest of the public, as well as compensating individual victims of such violations, the policy grounds cited by the Eleventh Circuit for holding Respondent absolutely immune fade in significance. In the Eleventh Circuit's view, "allowing civil suits [against complaining witnesses] for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings."

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[4] Petitioner has a pending claim against Respondent for retaliatory prosecution in violation of his First Amendment free speech rights. The Eleventh Circuit affirmed the District Court's denial of Respondent's motion to dismiss that claim on grounds of absolute and qualified immunity. App. 33a-34a. Although Petitioner therefore might recover from Respondent if the Petition is denied, the dismissal of the malicious prosecution claim at issue in the Petition is significant. Petitioner's retaliatory prosecution claim requires proof, *inter alia*, that Respondent's conduct had a retaliatory motive and was the "but for" cause of the decision by a special prosecutor (who replaced the recused District Attorney) to prosecute Petitioner. App. 33a (citing *Hartman v. Moore*, 547 U.S. 250, 265 (2006)). By contrast, the state of mind and causation elements of a Section 1983 malicious prosecution claim are somewhat less exacting. See *Wood v. Kesler*, 323 F.3d 872, 881-882 (11th Cir. 2003) (stating that elements include a Fourth Amendment violation plus "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to [him]"). Thus, depending on the facts developed in discovery and at trial, Respondent's degree of immunity from suit for malicious prosecution could be decisive.

The latter concern, however, carries little or no weight, as *Malley* establishes that witness immunity at common law was not "absolute." 475 U.S. at 340. Moreover, trial courts can no doubt fashion procedures to limit the revelation of grand jury testimony to the minimum degree necessary to litigate the particular Section 1983 claims before them.[5] Equally important, the deterrent effect of a Section 1983 remedy for unconstitutional abuse of grand juries by complaining witnesses is an important safeguard of the integrity of the judicial system.

The Eleventh Circuit also went too far in justifying absolutely immunity on the grounds that "[t]he [sole appropriate] remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages." *Jones*, 174 F.3d at 1287 n.10 (quoted in App. 13a). In the first place, of course, prosecution cannot substitute for a civil remedy, as the criminal system will not compensate the victim for the actual harm caused by the offense. But the Eleventh Circuit's view also seriously undervalues Section 1983's deterrence function. Relying solely on the discretion of prosecutors to investigate and charge their own malicious and perjurious complaining witnesses is a dubious means of discouraging future violations of the rights at stake. This is especially true where, as here, the complaining witness is alleged to have been doing the bidding of powerful interests in the community to whom the prosecutor is favorably inclined and may be politically indebted. Cf. *Briscoe*, 460 U.S. at

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[5] Here, because Respondent was either the sole witness or one of only two witnesses before the grand jury when it returned each of the three indictments (App. 83a-85a), discovery of grand jury material and deliberations would presumably be quite limited.

340-341 (acknowledging "some force" to argument that police officers are unlikely to be prosecuted for perjury).

Wrongful prosecutions of whistleblowers such as Petitioner, and of other individuals who are unpopular with state or local law enforcement officials, both violate and chill the exercise of fundamental constitutional rights. The especially strong public interest in *deterring* as well as remedying such abuses of the justice system merits central consideration in determining whether complaining witnesses are absolutely immune from suit under Section 1983 for maliciously perjured testimony before grand juries. In addition to the reasons set forth in the Petition, the Court should grant certiorari to ensure that Section 1983's deterrence function is afforded due weight in this context.

CONCLUSION

The Court should grant the Petition.

January 14, 2011

Respectfully submitted,

RICHARD E. CONDIT
Counsel of Record
MARK P. COHEN
GOVERNMENT ACCOUNTABILITY
PROJECT
1612 K Street NW,
Suite 1100
Washington, DC 20006
(202) 474-1000
M[illegible]rkC@whistleblower.org

DAVID W. SANFORD
KYLE CHADWICK
SANFORD WITTELS & HEISLER, LLP
1666 Connecticut Avenue NW
Suite 310
Washington, DC 20009
(202) 742-7780

Counsel for Amicus Curiae

JOINT
APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 9 - 2011
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No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III,
AND KELLY R. BURKE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

JOHN C. JONES *Counsel of Record* *248 Roswell Street* *Marietta, GA 30060* *(770) 427-8066* *Jcjones1234@bellsouth.net*	ANDREW J. PINCUS *Counsel of Record* *Mayer Brown LLP* *1999 K Street, NW* *Washington, DC 20006* *(202) 263-3000* *apincus@mayerbrown.com*
Counsel for Respondent Paulk	*Counsel for Petitioner*

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RELEVANT DOCKET ENTRIES

United States Court of Appeals
For the Eleventh Circuit

09-11897-GG

Charles A. Rehberg v. James A. Paulk

03/11/2010	Judgment Entered
03/11/2010	Opinion Issued AFFIRMED in pt/REVERSED in pt. & REMANDED
07/16/2010	Panel Petition for Rehearing is GRANTED in part and Denied in part
07/16/2010	Judgment Entered

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CHARLES A. REHBERG,

Plaintiff

V.

JAMES P. PAULK, IN HIS INDIVIDUAL CAPACITY; KENNETH B. HODGES, III, IN HIS INDIVIDUAL CAPACITY; KENNETH B. HODGES, III, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF DOUGHERTY COUNTY; KELLY R. BURKE, IN HIS INDIVIDUAL CAPACITY, AND DOUGHERTY COUNTY;

Defendants.

CIVIL ACTION FILE NO.________

JURY TRIAL DEMANDED

VERIFIED COMPLAINT

1. Plaintiff Charles A. Rehberg, a resident of Dougherty County, Georgia, states his Complaint as follows against Defendants James P. Paulk, in his individual capacity; Kenneth B. Hodges, III ("Ken Hodges"), in his individual capacity and in his official capacity as District Attorney of Dougherty County; Kelly R. Burke, in his individual capacity; and Dougherty County, a political subdivision in the State of Georgia.

2. Plaintiff Charles A. Rehberg is a resident of Dougherty County, Georgia.

3. Defendant James P. Paulk is the Chief Investigator in the Dougherty County District Attorney's Office. At all times referenced in this Complaint, Mr. Paulk was employed by Dougherty County in this

capacity. Mr. Paulk may be served with the Complaint and Summons at his business address of Office of the District Attorney, Albany-Dougherty Judicial Building, 225 Pine Ave., Room 231, Albany, Georgia 31701. Mr. Paulk is subject to the jurisdiction and venue of this Court.

4. Defendant Kenneth B. Hodges, III is the District Attorney of Dougherty County and held this position at all times referenced in this Complaint. Mr. Hodges is named as a defendant in his individual capacity and in his official capacity. Each Count of this Complaint specifies whether the allegations are against Mr. Hodges in his individual or official capacity. Mr. Hodges is subject to the jurisdiction and venue of this Court. He may be served with the Summons and Complaint at his business address of Office of the District Attorney, Albany-Dougherty Judicial Building, 225 Pine Ave., Room 231, Albany, Georgia 31701.

5. Defendant Kelly R. Burke is named as a defendant in his individual capacity. He may be served with the Summons and Complaint at his business address of Office of the District Attorney, 201 Perry Parkway, Perry, Georgia 31069. Mr. Burke is subject to the jurisdiction and venue of this Court.

6. Defendant Dougherty County is a political subdivision of the State of Georgia and may be served with the Summons and Complaint through Jeff Bodine Sinyard, Chairman of Dougherty County Board of Commissioners, 1702 West Town Road, Albany Georgia 31707. Mr. Rehberg has provided Dougherty County with written notice of his claims, although O.C.G.A. 36-11-1 does not apply to Plaintiff's federal and state constitutional claims or his

claims against Dougherty County employee James Paulk in his individual capacity.

7. This Court has personal jurisdiction over the Defendants.

8. The Court has subject matter jurisdiction over this action under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The claims asserted in this Complaint arise under federal law and present issues of federal law. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 to adjudicate state law claims that arise out of a common nucleus of operative facts.

9. Venue is proper in this Court because a substantial portion of the events giving rise to this Complaint occurred within the Albany Division of this District.

FACTUAL ALLEGATIONS

10. By way of introduction to Mr. Rehberg's claims, on December 14, 2005, Charles Rehberg was indicted on charges of aggravated assault, burglary and "harassing telephone calls" in Dougherty County. According to Dougherty County Criminal Indictment No. 05-R-1253, Mr. Rehberg allegedly assaulted Dr. James Hotz by "suggesting that the accused had a weapon, when the accused did confront the victim in the victim's home, and such act placed the victim in reasonable fear of immediate serious bodily harm, contrary to the laws of said state, the good order, peace and dignity thereof." In the same indictment, Mr. Rehberg was also charged with burglary and accused of "intentionally, unlawfully and without authority enter[ing]...[the] home of Dr. James A. Hotz...with the intent to commit therein the crime of aggravated assault." Both the charge of aggravated assault and the charge of burglary are fe-

lonies punishable by imprisonment up to 20 years under Georgia law. The Indictment also included six counts of "harassing telephone calls", misdemeanors punishable by imprisonment of up to one year each.

11. The truth is that Mr. Rehberg has never been to the home of Dr. Hotz. The charges against Mr. Rehberg were false. There is no evidence whatsoever that Mr. Rehberg committed a burglary or aggravated assault on anybody as he was charged. There is no evidence that he was ever a party to any burglary or aggravated assault. There is no evidence that a burglary or aggravated assault or simple assault ever even occurred. The "harassing telephone calls" as alleged, were in regard to faxes sent by Mr. Rehberg critical of a public hospital which were clearly free speech as protected under the U.S. Constitution.

12. The persons who handled the investigation which led to these charges and indictment were James P. Paulk, Chief Investigator employed by Dougherty County in the District Attorney's Office, Dougherty County District Attorney Ken Hodges, and Kelly Burke, a specially appointed prosecutor in this matter.

13. There was never any police report of any alleged assault or burglary. Dr. Hotz never filed any police report or reported any assault or burglary to the Dougherty County District Attorney's Office or the Albany Police Department. Neither the Albany Police Department nor any other agencies were ever involved in any investigation of this alleged assault or burglary.

14. The Chief Investigator, Mr. Paulk, testified that he and Mr. Hodges initiated and handled

the investigation of Mr. Rehberg supposedly because "of lack of confidence in the City police department to handle it." (Paulk Dep. p. 25). Mr. Paulk testified, "There's [sic] a lot of problems with the Albany Police Department, lack of credibility in their work product." *Id.*

15. When Mr. Paulk and a former Dougherty County Investigator, Mr. Barry McKinley, were deposed in August of 2006, Mr. Rehberg learned of the facts which form the basis of these claims against Mr. Paulk and Dougherty County.

16. In the original Grand Jury proceeding, only one witness testified: Mr. Paulk. Mr. Paulk is listed as the "complainant" in the indictment against Mr. Rehberg. (Paulk Dep. pp. 19-20). Mr. Paulk admitted that he told the Grand Jury, "These are true and accurate facts based upon the indictment." *Id.* at p. 109.

17. Yet, Mr. Paulk has now admitted that he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary. (Paulk Dep. p. 111). He has now admitted his "lack of knowledge and preparation." (Paulk Dep. p. 78). He never even interviewed the supposed recipients of the anonymous faxes who were somehow "harassed." *Id.* Based upon information and belief, one of the alleged fax recipients did not even have a fax machine. Additionally, one of the so-called fax "victims" was Congressman Sanford Bishop who, when interviewed by the press, stated that his office was never harassed by the faxes in question or any faxes from constituents stating their opinions.

18. Mr. Paulk has testified that it is "unfortunately" normal and common for him and other investigators employed by Dougherty County and working under the supervision of the District Attorney to testify without adequate knowledge or preparation or personal knowledge of the facts being attested to as true. At his deposition, Mr. Paulk somehow blamed the "incompetence" of the Albany Police Department for this common practice and custom.

19. Based on the investigation conducted by Mr. Paulk, Mr. Hodges, and Mr. Burke, there was no probable cause to indict Mr. Rehberg on charges of burglary, aggravated assault or "harassing" phone calls.

20. The three indictments of Mr. Rehberg were widely covered in the local and state press, including the Albany Herald, WALB-TV, WFXL-TV, and the Atlanta Journal. Mr. Burke conducted interviews with the press and also issued press statements in which he addressed challenges by Mr. Rehberg's counsel and stated, "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them." Mr. Burke represented to the public and the press that Mr. Rehberg had committed an assault. Mr. Burke also publicly stated, "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming." Mr. Burke's statements were published in the press. Mr. Burke publicly indicated that Mr. Rehberg illegally went onto "someone else's property" and committed an assault.

21. Mr. Rehberg's counsel[1] filed pleadings attacking the legal sufficiency of the first indictment

and a hearing was scheduled by the presiding judge. On February 2, 2006, District Attorney Kelly Burke dismissed and nol-prossed the entire indictment prior to the scheduled hearing, thus terminating the first Indictment, Criminal Indictment No. 05-R-1253.

22. Mr. Burke and Mr. Paulk appeared before a second Grand Jury on or about February 15, 2006, and engineered yet another indictment of Mr. Rehberg which was issued February 16, 2006. The second Indictment included charges of "simple assault" and five counts of "harassing telephone calls." Mr. Paulk again appeared as a state witness along with Dr. James A. Hotz. The indictment charges Mr. Rehberg "with the offense of Simple Assault, for that the said accused, in the County aforesaid, on or about August 22, 2004 did commit an act which placed James A. Hotz, the victim, in reasonable apprehension of immediately receiving a violent injury, to wit did by actions suggest that he had a weapon which placed the accused in fear of receiving a violent injury, contrary to the laws of said State, the good order, peace and dignity thereof." Mr. Rehberg still had never been to the home of Dr. Hotz and was nowhere near Dr. Hotz on August 22, 2004. There was no evidence whatsoever that Mr. Rehberg committed an assault on anybody as he was charged. There was no evidence that he was a party to any assault, nor that an assault or simple assault even ever occurred. The faxes sent by Mr. Rehberg were not "harassing telephone calls" as alleged, but rather free speech as protected under the U.S. Constitution. No probable cause existed for any of the charges against Mr. Rehberg.

23. Before the second Indictment, it was widely reported in the press that Dr. Hotz had filed

no police report of any incident and that several so-called "victims" of the faxes did not consider themselves victims. It was also reported that no individual had filed a complaint, and Dougherty County Chief Judge Loring Gray had even commented to the press on inaccuracies in the allegations of the indictment.

24. Mr. Rehberg's counsel filed a motion attacking the legal sufficiency of the Second Indictment and the presiding judge scheduled a hearing. At a pretrial hearing held on April 10, 2006, Mr. Burke announced in open court that Criminal Indictment No. 06-R-121 was, or would immediately be dismissed. However, Mr. Burke failed to dismiss the Indictment as he had represented to the court. As a result, on July 7, 2006, as requested by Mr. Rehberg's counsel, the Court dismissed the entire Indictment by Order of the Court, pursuant to the District Attorney's announcement made on April 10, 2006, thus terminating Criminal Indictment No. 06-R-121.

25. Mr. Burke and Mr. Paulk appeared before a third Grand Jury on March 1, 2006 and secured Criminal Indictment No. 06-R-183 again charging Mr. Rehberg with "simple assault" and "harassing telephone calls." Again, Mr. Rehberg's counsel filed pleadings attacking the legal sufficiency of the pleadings and the presiding judge scheduled a hearing.

26. On May 1, 2006, Judge Harry Altman issued two orders dismissing all charges against Mr. Rehberg. With respect to the charges of "harassing phone calls," Judge Altman found that "the conduct set forth in the indictment is not a violation of the statute [O.C.G.A. § 46-5-21], as alleged." With re-

spect to the charge of simple assault, Judge Altman determined that the indictment "only refers to actions, just a repeat of the term without any description of the act." Judge Altman further found that the indictment does not refer to a specific time or time period, but refers only to an occurrence 'on or about August 22, 2004...'" The Defendants were not put "on notice of the actions of which the Indictment refers." Judge Altman concluded that the Indictment "does not sufficiently charge the Defendants with a criminal defense."

27. The second Indictment, Indictment No. 06-R-121 was not dismissed until July 7, 2006. Even though Mr. Burke had announced in open court on April 10, 2006 that such indictment was or would be immediately dismissed, he failed in fact to do so. Upon request by Mr. Rehberg's counsel, Judge Altman therefore dismissed such Indictment by Order dated July 7, 2006.

28. The Orders of Judge Altman were never appealed.

29. After three indictments, the criminal charges against Mr. Rehberg are no longer pending. However, the damage to Mr. Rehberg has been done. Probable cause never existed for any of the charges alleged against Mr. Rehberg. Yet he was the subject of an extensive illegal investigation conducted as a political favor. Mr Rehberg was indicted three times, arrested, and was forced to pay significant attorneys' fees to defend himself. He was charged with two felonies punishable up to 40 years in prison, traumatized by the fear of going to prison for the rest of his life expectancy, and leaving his wife and two young daughters. Mr. Rehberg suffered medical problems from the stress of the indictments, was subjected to

extensive publicity in the media where he was identified as being charged with multiple felonies and misdemeanors, and publicly identified by the acting District Attorney as having committed an assault and burglary. The damage of three indictments on his public record will remain with him and his wife and children for the rest of their lives.

30. Mr. Rehberg is a Certified Public Accountant. He handles assets and financial matters of others. The trust others place in him and his reputation and integrity are critical to his profession, career, and earnings. These wrongful indictments will always be associated with his name and have caused and will cause significant personal, professional and economic damages to Mr. Rehberg.

31. Mr. Rehberg sent anonymous faxes during the period September 2003 through March 2004 which criticized and parodied the management and activities of Phoebe Putney Memorial Hospital, a public entity operated on property owned by the Albany-Dougherty County Hospital Authority. Sending such faxes is not a crime under Georgia law. Never in history has any person in Georgia been prosecuted for sending faxes of this nature.

32. In retaliation for Mr. Rehberg exercising his rights to free speech, he was indicted and charged with multiple misdemeanors and felonies. What happened to Mr. Rehberg should not happen in a country with the right of free speech and due process.

33. A former investigator employed by Dougherty County with the Dougherty County District Attorney's office, Barry McKinley, has testified that the investigation of Mr. Rehberg was a political

favor. (McKinley Dep. pp. 42, 46, 144). Mr. Mckinley repeatedly testified that the investigation "stunk." (McKinley Dep. p. 25). "It's kind of like bad tuna, it stunk." (McKinley Dep. p. 26). When asked to explain, Mr. McKinley testified, "I'm fishing for the right words. It did not have the makings of a good case. It was one of these, 'I know something is going on and you can't prosecute.'" (McKinley Dep. p. 66). Mr. Paulk has admitted that Mr. McKinley told him the investigation "stunk," yet Mr. Paulk, ignoring Mr. McKinley, continued the investigation leading to Mr. Rehberg's indictment on false charges. (Paulk Dep. p. 57).

34. Mr. McKinley also called the investigation "distasteful." (McKinley Dep. p. 73). "The number one source of distaste is that the criminal system could be used like this..." (McKinley Dep. p. 73).

35. Mr. Paulk has admitted that he told other witnesses that the investigation of Mr. Rehberg was a "favor" to Phoebe Putney Memorial Hospital. (Paulk Dep. pp. 75-76, 115). Mr. Paulk testified, "I made the comment, 'Well, you know, Phoebe owes me. I'm doing Phoebe a favor.'" *Id.* at 115. Other witnesses have confirmed Mr. Paulk's admission that he was doing Phoebe Putney a favor by investigating Mr. Rehberg.

36. In the investigation of Mr. Rehberg, Mr. Paulk and Mr. Hodges prepared and issued numerous subpoenas at the direction of private civilians. Such subpoenas violated Georgia law and Mr. Rehberg's constitutional civil rights.

37. On October 22, 2003, a subpoena was issued under the letterhead of Kenneth B. Hodges, III, District Attorney to Bell South requiring the

production of certain telephone records. On December 1, 2003, under the letterhead of Kenneth B. Hodges, III, District Attorney, another subpoena was issued to Bell South for certain telephone records. On January 20, 2004 another subpoena under the letterhead of Kenneth B. Hodges, III, District Attorney was issued to Bell South for certain telephone number records. On February 5, 2004, a subpoena for production of evidence was issued to Bell South Subpoena Compliance Center for telephone number (229) 888-9649, Mr. Rehberg's unlisted residential number. On February 24, 2004, a subpoena issued to Alltel requiring production of information of records concerning certain telephone numbers. Sprint long distance responded on January 27, 2004 to Mr. Paulk in response to a Subpoena (date unknown) for certain prepaid long distance calls originated by Mr. Rehberg. Mr. Paulk also prepared and issued a subpoena to Exact Advertising, the Internet service provider of one of Mr. Rehberg's email accounts, and obtained Mr. Rehberg's personal e-mails that were sent and received from his personal computer.

38. On the dates set forth in the numerous subpoenas for appearance, the Dougherty County Grand Jury was not meeting to consider the case of the *State vs. Charles Rehberg, John Bagnato, and Jim Bowman*. The case against Mr. Rehberg was not presented to the Dougherty County Grand Jury until December 14, 2005. Mr. Paulk has now admitted that at the time he prepared and issued the subpoenas, "[t]here was not [a Grand Jury] impaneled. There was not one impaneled at the time." (Paulk Dep. p. 82).

39. The subpoenas ostensibly required the persons to whom they were directed to appear before

Dougherty County Grand Jury. The recipients of these subpoenas were never required to appear before a Grand Jury but were directed by the District Attorney's office to turn the subpoenaed records over to that office.

40. Upon receipt of the subpoenaed records, Mr. Paulk provided the records, including Mr. Rehberg's personal e-mails, to private civilians, who in turn paid for the information. The subpoenas were never intended to require an appearance before the Grand Jury on any matter pending before a Grand Jury, but were intended only to abuse the subpoena powers to obtain confidential and private records for private civilians.

41. The Georgia Supreme Court has long recognized the "liberty of privacy" guaranteed by the Georgia Constitution. Investigators are not entitled to exercise indiscriminate subpoena power as an investigative substitute for the procedural devices otherwise available in the criminal context.

42. In this case Mr. Paulk and Mr. Hodges, acting as investigators months before any Grand Jury proceeding had been convened, invaded the privacy of numerous citizens, without any pending indictment or case, as a fishing expedition and discovery device, neither of which are allowed under Georgia law. The subpoenas were not employed to produce evidence which was relevant to a pending case. Rather, the subpoenas were abused to produce information to benefit private civilians who paid to obtain the subpoenaed information.

43. The abuse of subpoena powers to gather information for private civilians here, where there is no case pending, nor indictment before a Grand Jury,

is not allowed under Georgia statutes and is prohibited by the Constitutions of Georgia and the United States.

44. A district attorney is the only person authorized to represent the State in a criminal proceeding. The Constitution of Georgia, Article VI, Section VIII, Paragraph I, O.C.G.A. §15-18-6. Private special prosecutors are not allowed. Uniform Superior Court Rule 42.1. In violation of these laws, the subpoenas were issued illegally by Mr. Paulk and Mr. Hodges at the direction of private investigators working for private civilians.

45. In violation of Georgia law, Mr. Paulk conducted the investigation at the direction of and in cooperation with civilian private investigators. Although Mr. Paulk admitted that private civilians directed the substance of the subpoenas and Mr. Paulk followed their directions, Mr. Paulk claims he told the private investigators, "You guys, you do the leg work and report back to me." (Paulk Dep. p. 35). Yet when the private investigators prepared reports and gave them to Mr. Paulk, he never bothered to read them. (Paulk Dep. p. 71). "I've seen them but I never read through them." *Id.*

46. After subpoenaing numerous documents without any Grand Jury proceedings, Mr. Paulk, in exchange for payment, provided the documents to the same private investigators. When Mr. McKinley learned of Mr. Paulk's actions, he told him, "That's BS. We can't do that." (McKinley Dep. p. 32). "That's wrong. We cannot give the information that's subpoenaed under our power. We...that's not right." (McKinley Dep. p. 33).

47. When asked whether it was a common practice for his office to give documents subpoenaed for a Grand Jury to private civilians, Mr. Paulk answered, "I didn't give it to them. They had to pay for it." (Paulk Dep. pp. 30-31). "They paid to see what we had. That's how I would phrase it." *Id.* at 86.

48. Mr. Paulk also violated O.C.G.A. § 16-10-3 which prohibits state offices or employees from receiving private or corporate funds to be used in the enforcement of the penal laws. Mr. McKinley also confirmed that it was "wrongful conduct" for Mr. Paulk to accept payment for the subpoenaed documents. (McKinley Dep. p. 38). When asked if he was familiar with the statute which prohibits a law enforcement agency from receiving money for an investigation, Mr. Paulk answered, "I did not at the time, but I do now." (Paulk Dep. p. 85).

49. Rather than deposit and record the funds received illegally in payment for the subpoenaed information, in most instances the District Attorney's office instructed the benefactors of the information to make their payments directly to BellSouth and other subpoenaed parties. By structuring the transactions in this manner, debts of the District Attorney's office were paid by the benefactors, without creating an obvious audit trail of the illegal receipts.

50. Mr. Paulk is not entitled to official immunity because his conduct violated numerous ministerial duties. He did not have discretion to violate Georgia statutes or Mr. Rehberg's constitutional civil rights.

51. Mr. Rehberg also recently learned that a clerk in the Dougherty County Tax Office ran his

Motor Vehicle Report and provided it to the same private investigators. This release of documents by a Dougherty County clerk violates state and federal law. This action is further evidence of Dougherty County employees illegally providing information and documents regarding Mr. Rehberg to private civilians.

52. Mr. Rehberg and Phoebe Putney Health System, Inc., a/k/a Phoebe Putney Health Systems, Inc., Phoebe Putney Memorial Hospital, Inc., Larry J. McCormick & Associates, LLC., Larry J. McCormick, and Stephen B. Chenoweth and Langley & Lee and C. Richard Langley have resolved their claims arising from these events. This Complaint does not raise any grievance or claim against such entities and individuals regarding the alleged conduct of such entities and individuals in the events described above.

53. Mr. Hodges, Mr. Paulk, and Mr. Burke are not entitled to qualified immunity. With respect to the federal causes of action alleged in this Complaint, Mr. Hodges, Mr. Paulk, and Mr. Burke were not performing discretionary functions. Moreover, their conduct violated clearly established constitutional rights of which a reasonable person would have known.

54. A prosecutor's administrative duties and investigatory functions are not entitled to absolute immunity. Mr. Hodges never served as the actual prosecutor of the charges against Mr. Rehberg before the Grand Jury. He publicly recused himself as the prosecutor after unfavorable press coverage which questioned his alleged conflicts of interest from his relationships with Phoebe Putney Memorial Hospital. Yet Mr. Hodges remained Mr. Paulk's su-

pervisor as Mr. Paulk continued the investigation and he was in communication with Mr. Burke concerning the evidence and charges against Mr. Rehberg prior to the Grand Jury proceedings.

55. The actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. When a prosecutor performs the investigative functions normally performed by a detective or police officer, he is not entitled to absolute immunity.

56. Mr. Rehberg's allegations against Mr. Hodges concern the period of time before the special Grand Jury was impaneled. Mr. Hodges' actions at that time were entirely investigative in character. Under Supreme Court precedent, a prosecutor is not an advocate before he has probable cause to have anyone arrested. Mr. Hodges was not acting as an advocate or prosecutor entitled to absolute immunity at the time of the events in question.

57. That a Grand Jury was called to consider the evidence Mr. Hodges' work produced does not retroactively transform that work from the administrative into the prosecutorial. Mr. Hodges may not shield his investigative work with the aegis of absolute immunity merely because, after Mr. Rehberg was eventually arrested and indicted, that work may be retrospectively described as "preparation" for a possible trial. Under Supreme Court precedent, when the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.

58. Likewise, Mr. Burke's statements to the media are not entitled to absolute immunity. Comments to the media have no functional tie to the judi-

cial process just because they are made by a prosecutor. At the press conference, Mr. Burke did not act in his role as advocate for the State. Conducting a press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions.

59. Most public officials are entitled only to qualified immunity under federal law. Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Mr. Hodges, Mr. Paulk, and Mr. Burke were not acting within the scope of their discretionary functions with respect to their misconduct described in this Complaint. Moreover, even if they were arguably performing discretionary functions, their conduct violated Mr. Rehberg's clearly established constitutional rights.

60. Likewise, State immunities do not apply to suits brought under Section 1983. The Supreme Court has held that a state law which immunizes government conduct otherwise subject to suit under Section 1983 is preempted because the application of the state immunity law would thwart the congressional remedy.

COUNT ONE AGAINST JAMES PAULK IN HIS INDIVIDUAL CAPACITY— NEGLIGENCE

61. Plaintiff Charles Rehberg repeats and incorporates the allegations of Paragraphs 1 through 60 as if fully stated herein.

62. In the performance of his ministerial duties in the investigation of Mr. Rehberg and in his testimony before the Grand Jury, Mr. Paulk owed the duty to exercise due care.

63. Mr. Paulk's negligent performance of his ministerial duties include, but are not limited to, the following: (i) he prepared and issued subpoenas at the direction of private civilians without any pending Grand Jury proceeding as represented in the subpoenas, (ii) he investigated Mr. Rehberg in coordination and concert with private civilians, (iii) he released subpoenaed documents to private civilians in exchange for payment, and (iiii) on multiple occasions he attested to the truth of "facts" as a complaining witness before a Grand Jury to which "facts" he had no knowledge and concerning matters that he had never investigated.

64. Mr. Paulk breached his duty of due care and committed negligence in the performance of his ministerial duties. Such negligence proximately caused damages to Mr. Rehberg for which Mr. Paulk is liable and for which Mr. Paulk is not immune.

COUNT TWO AGAINST JAMES PAULK IN HIS INDIVIDUAL CAPACITY— NEGLIGENCE *PER SE*

65. Mr. Rehberg repeats and incorporates the allegations of Paragraphs 1 through 60 as if fully stated herein.

66. During the investigation of Mr. Rehberg and in the performance of his ministerial duties, Mr. Paulk committed negligence *per se*.

67. Mr. Paulk's acts of negligence *per se* include, but are not limited to, the following: (i) He prepared and issued subpoenas at the direction of

private civilians without any pending Grand Jury proceeding as represented in the subpoenas, (ii) he investigated Mr. Rehberg in coordination and concert with private civilians, (iii) he released subpoenaed documents to private civilians in exchange for payment, and (iiii) he attested to the truth of facts as a complaining witness before a Grand Jury to which "facts" he had no knowledge and concerning matters that he had never investigated.

68. Mr. Paulk committed negligence *per se* in the performance of his ministerial duties. Such negligence *per se* proximately caused damages to Mr. Rehberg for which Mr. Paulk is liable and for which Mr. Paulk is not immune.

69. The abuse of subpoena powers to gather information for private civilians here, where there is no case pending, nor indictment before a Grand Jury, is not allowed under Georgia statutes and is prohibited by the Constitutions of Georgia and the United States.

70. A district attorney is the only person authorized to represent the State in a criminal proceeding. The Constitution of Georgia, Article VI, Section VIII, Paragraph I, O.C.G.A. §15-18-6. Private special prosecutors are not allowed. Uniform Superior Court Rule 42.1. In violation of these laws, the subpoenas were issued illegally by Mr. Paulk and Mr. Hodges at the direction of private civilians.

71. In violation of Georgia law, Mr. Paulk conducted the investigation at the direction and in cooperation with civilian private investigators.

72. After subpoenaing numerous documents without any Grand Jury proceedings, Mr. Paulk gave the documents to the same private investigators.

When asked whether it was a common practice for his office to give documents subpoenaed for a Grand Jury to private civilians, Mr. Paulk answered, "I didn't give it to them. They had to pay for it." (Paulk Dep. pp. 30-31). "They paid to see what we had. That's how I would phrase it." *Id.* at 86.

73. Mr. Paulk violated O.C.G.A. § 16-10-3 which prohibits state offices or employees from receiving private or corporate funds to be used in the enforcement of the penal laws.

74. Mr. Paulk is not entitled to official immunity because his conduct violated numerous ministerial duties established by Georgia law.

COUNT THREE AGAINST JAMES PAULK---TORT OF INVASION OF PRIVACY FOR CASTING MR. REHBERG IN A FALSE LIGHT

75. Plaintiff Charles Rehberg repeats and incorporates the allegations of Paragraphs 1 through 74 above as if fully stated herein.

76. The right of privacy is recognized in Georgia as a fundamental constitutional right, having a value essential to individual liberty in our society.

77. Under Georgia law, the right of privacy protects individuals from publicity which places them in a false light.

78. Due to Mr. Paulk's negligence in the performance of his ministerial duties, media publicity depicted Mr. Rehberg as something or someone which he is not. The false light in which Mr. Rehberg was placed would be highly offensive to a reasonable person.

79. Publicity which places a plaintiff in a false light in the public eye is one of the four torts that make up the general tort of invasion of privacy under Georgia law.

80. Mr. Paulk's negligent performance of his ministerial duties was one of the proximate causes of the publicity which placed Mr. Rehberg in a false light as an accused criminal charged with burglary, aggravated assault, and simple assault.

81. During the winter, spring, and summer of 2006, due in part to Mr. Paulk's negligent performance of his ministerial duties, including attesting to false facts as the complainant before the Grand Jury, there was extensive publicity which associated Mr. Rehberg with having committed a burglary, aggravated assault, simple assault, and making harassing phone calls.

82. Due to the false light in which he was portrayed, Mr. Rehberg has suffered damages to his personal and professional reputation, medical problems, legal expenses, mental distress, and substantial diminished earning capacity and employment opportunities.

83. For the tort of invasion of privacy in casting Mr. Rehberg in a false light, Mr. Paulk is liable to Mr. Rehberg for all damages allowed by Georgia law.

COUNT FOUR AGAINST DEFENDANT JAMES PAULK---TORT OF INVASION OF PRIVACY FOR ILLEGALLY INTRUDING INTO MR. REHBERG'S PRIVATE AFFAIRS

84. Plaintiff Charles Rehberg repeats and incorporates the allegations of Paragraphs 1 through 83 above as if fully stated herein.

85. Under Georgia case law, the concept of invasion of privacy encompasses four loosely related but distinct torts, including intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

86. In preparing and issuing illegal subpoenas to obtain Mr. Rehberg's private phone records and e-mails at the direction and for the benefit of private civilians, Mr. Paulk wrongfully intruded upon Mr. Rehberg's private affairs.

87. Mr. Paulk's wrongful intrusion into Mr. Rehberg's private affairs caused damages to Mr. Rehberg.

88. Mr. Paulk's wrongful intrusion into Mr. Rehberg's private affairs constitute a tort under Georgia law and a negligent violation of his ministerial duties for which he is liable to Mr. Rehberg for all damages allowed by law.

COUNT FIVE AGAINST DOUGHERTY COUNTY---RESPONDEAT SUPERIOR FOR THE NEGLIGENCE AND TORTS COMMITTED BY ITS EMPLOYEE JAMES PAULK

89. Plaintiff Charles Rehberg repeats and incorporates the allegations of Paragraphs 1 through 88 above as if fully stated herein.

90. Defendant James Paulk committed the torts and acts of negligence described above in the course of his employment with Defendant Dougherty County.

91. Defendant Dougherty County employed Defendant James Paulk at all times referenced in this Complaint.

92. Dougherty County participated in hiring, training, supervising, and paying Mr. Paulk for

his work as Chief Investigator throughout the period of time at issue in this lawsuit. Dougherty County also supplied Mr. Paulk's office, office supplies, and administrative and secretarial support used in the investigation of Mr. Rehberg at issue in this Complaint

93. Defendant Dougherty County paid the salary of Defendant James Paulk throughout the time period of the negligence and torts committed by Mr. Paulk which damaged Mr. Rehberg.

94. On information and belief, Defendant Dougherty County has purchased commercial insurance which provides coverage for the negligent acts of Mr. Paulk and the personal injuries caused by his negligence and torts.

95. Under the doctrine of respondeat superior, Defendant Dougherty County is liable for the negligence and torts of its employee James Paulk and the damages caused to Mr. Rehberg due to such negligence and torts.

COUNT SIX AGAINST JAMES PAULK IN HIS INDIVIDUAL CAPACITY AND KEN HODGES IN HIS INDIVIDUAL CAPACITY ---VIOLATIONS OF 42 U.S.C. 1983 FOR MALICIOUS PROSECUTION, VIOLATIONS OF MR. REHBERG'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT, AND VIOLATIONS OF MR. REHBERG'S RIGHTS UNDER THE FOURTEENTH AMENDMENT

96. Mr. Rehberg repeats and incorporates the allegations of Paragraphs 1 through 60 as if fully stated herein.

97. The Fourth Amendment of the United States Constitution protects citizens from unreason-

able searches and seizures. The United States Supreme Court has ruled that the Fourth Amendment is applicable to state governments by operation of the Fourteenth Amendment.

98. Under binding Eleventh Circuit precedent, malicious prosecution is a violation of the Fourth Amendment and a viable constitutional tort cognizable under Section 1983.

99. Acting as investigators, Mr. Paulk and Mr. Hodges instituted an investigation of Mr. Rehberg and then instigated criminal indictments of Mr. Rehberg with malice and without probable cause.

100. At all times relevant to these allegations for violations of 42 U.S.C. § 1983, Mr. Hodges and Mr. Paulk acted under color of law.

101. The criminal investigation, indictment, and prosecution of Mr. Rehberg were induced by fabricated evidence and bad faith.

102. The indictments were dismissed in Mr. Rehberg's favor.

103. The illegal indictments caused significant damages to Mr. Rehberg for which he is entitled to recover under Section 1983.

104. Mr. Rehberg was arrested, booked, fingerprinted, and photographed as a criminal accused. The Fourth Amendment addresses "pretrial deprivations of liberty" and protects citizens such as Mr. Rehberg from unreasonable searches and seizures without probable cause.

105. His arrest warrant is void under the Fourth Amendment because the testimony provided by Mr. Paulk supposedly supporting the warrant contains reckless disregard for the truth. Mr. Paulk

has admitted that he lacked "preparation and knowledge." He has admitted that he had no evidence that Mr. Rehberg had committed an aggravated assault, assault or burglary.

106. A warrant affidavit or testimony violates the Fourth Amendment when it contains omissions made intentionally or with a reckless disregard for the accuracy of the affidavit or testimony. Such omissions occurred in this case.

107. In this case, Mr. Paulk and Mr. Hodges, acting as investigators months before any Grand Jury proceeding had been convened, invaded the privacy of Mr. Rehberg, without any pending indictment or case, as a fishing expedition and discovery device for private civilians, neither of which are allowed under Georgia law. The subpoenas were not employed to produce evidence which was relevant to a pending case. Rather, the subpoenas were abused to produce information to benefit private civilians who paid to obtain the subpoenaed information for use in private civil litigation.

108. The abuse of subpoena powers to gather information for private civilians here, where there is no case pending, nor indictment before a Grand Jury, is not allowed under the Fourth Amendment of the United States Constitution.

109. There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government. Mr. Rehberg was subjected to criminal charges on the basis of false evidence that was deliberately fabricated.

110. Simply obtaining an indictment does not insulate state actors from an action for malicious

prosecution under Section 1983. In this case where indictments were obtained, the state actors are not insulated from Section 1983 liability because the finding of probable cause remained tainted by the malicious actions of the government officials.

111. Nor is Mr. Paulk entitled to immunity. When an officer knows, or has reason to know, that he has materially misled a Grand Jury on the basis for a finding of probable cause, as where a material omission is intended to enhance the support for a conclusion of probable cause, the shield of qualified immunity is lost.

112. In the original indictment for aggravated assault and burglary, Mr. Paulk is listed as the complainant. Mr. Paulk has admitted that he was the only witness who served in such role before the Grand Jury in the original indictment for aggravated assault and burglary against Mr. Rehberg.

113. Mr. Hodges knew or should have known that there was no probable cause to indict Mr. Rehberg on charges of aggravated assault and burglary, yet he directed Mr. Paulk to appear before the Grand Jury and to attest to the truth of such charges. Mr. Hodges is not entitled to absolute immunity for such actions. Mr. Hodges was not acting as a prosecutor or advocate for the state. He is not entitled to the protections of absolute immunity while functioning in such a capacity.

114. The term "complaining witness" describes the persons who actively instigated or encouraged the prosecution of the plaintiff. Both Mr. Paulk and Mr. Hodges actively instigated and encouraged the prosecution of Mr. Rehberg.

115. The conduct of Mr. Hodges and Mr. Paulk violated clearly established statutory or constitutional rights of which a reasonable person would have known.

116. For purposes of §1983 liability, the requisite causal chain can occur through the setting in motion of a series of acts by others which the actor knows or reasonably should know would cause constitutional violations. Mr. Hodges and Mr. Paulk set a series of acts in motion which they knew or reasonably should have known would cause violations of Mr. Rehberg's constitutional rights.

117. Not only did Mr. Paulk and Mr. Hodges set the events in motion, but Mr. Paulk provided false testimony as the complaining witness to the Grand Jury.

118. Mr. Hodges was Mr. Paulk's supervisor in the investigation of Mr. Rehberg. As a supervisor, Mr. Hodges is liable to Mr. Rehberg under Section 1983. Mr. Hodges had actual or constructive knowledge that his subordinate, Mr. Paulk, was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to Mr. Rehberg; Mr. Hodges' response to that knowledge was so inadequate as to show deliberate indifference or at least tacit authorization of the offensive practices; and there is an affirmative causal link between Mr. Hodges' actions and inactions and the particular constitutional injuries suffered by Mr. Rehberg.

119. Mr. Hodges' and Mr. Paulk's violations of 42 U.S.C. § 1983 caused Mr. Rehberg to suffer personal injuries and damages for which they are liable.

120. Under 42 U.S.C. § 1983, Mr. Hodges and Mr. Paulk are liable to Mr. Rehberg for all damages allowed by federal law.

COUNT SEVEN AGAINST JAMES PAULK IN HIS INDIVIDUAL CAPACITY AND KEN HODGES IN HIS INDIVIDUAL CAPACITY---VIOLATIONS OF 42 U.S.C. § 1983 FOR INSTIGATING A RETALIATORY PROSECUTION

121. Plaintiff Mr. Rehberg repeats and incorporates the allegations of Paragraphs 1 through 60 as if fully stated herein.

122. Freedom of speech is one of the fundamental personal rights and liberties protected from governmental intrusion by the First and Fourteenth Amendments to the U.S. Constitution.

123. Mr. Rehberg was charged with faxing documents which criticized the activities and financial management of a public entity. Silencing one who is voicing concerns or criticism about a public entity's activities is an anathema to free speech.

124. Chilling his political speech was a substantial or motivating factor in the wrongful conduct of Mr. Paulk and Mr. Hodges in investigating Mr. Rehberg, issuing illegal subpoenas, providing subpoenaed documents to private civilians, and instigating the wrongful indictments of Mr. Rehberg.

125. As a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for engaging in constitutionally protected speech. Official reprisal for protected speech offends the Constitution because it threatens to inhibit exercise of the protected right.

126. A retaliatory prosecution action may properly be brought against a prosecutor for conduct taken in an investigatory capacity, to which absolute immunity does not extend.

127. The Due Process Clause of the Fourteenth Amendment incorporates the limitations and protections of the First Amendment to also restrict the states.

128. There was no probable cause for the underlying criminal charges against Mr. Rehberg and such charges would not have been brought if there was no retaliatory motive.

129. After public criticisms of their illegal subpoenas and charges of political favoritism in instigating the investigation, Mr. Paulk and Mr. Hodges acted under color of law in retaliation and wrongfully influenced and instigated the prosecutorial decision to bring charges against Mr. Rehberg. Mr. Hodges and Mr. Paulk also acted in retaliation to Mr. Rehberg's criticisms of the activities and financial management of a public hospital to which Mr. Hodges and Mr. Paulk had close political connections and personal relationships.

130. The retaliatory investigation and prosecution of Mr. Rehberg caused him to suffer significant personal injuries and economic damages.

131. The retaliatory investigation and prosecution of Mr. Rehberg violated Mr. Rehberg's rights under the First Amendment and violated 42 U.S.C. § 1983. Defendants James Paulk and Ken Hodges are liable in their individual capacities to Mr. Rehberg for all damages allowed by law.

COUNT EIGHT AGAINST KELLY BURKE IN HIS INDIVIDUAL CAPACITY---VIOLATIONS OF 42 U.S.C. § 1983

132. Plaintiff Charles Rehberg repeats the allegations of Paragraphs 1 through 60 as if fully stated herein.

133. After Mr. Hodges publicly recused himself from the investigation of Mr. Rehberg, Mr. Burke was appointed to participate in the investigation at Mr. Hodges' request of the Georgia Attorney General's office.

134. During the investigation of Mr. Rehberg before any Grand Jury had been impaneled and before Mr. Burke was acting in his role as advocate for the State, Mr. Burke participated in fabricating evidence that Mr. Rehberg had committed an aggravated assault and burglary. There is no evidence that Mr. Rehberg ever committed a burglary or aggravated assault on anybody, yet Mr. Burke in his investigation participated in fabricating such evidence.

135. Mr. Burke then called Mr. Paulk to testify on short notice as the complaining witness before the Grand Jury and attest to the truth of the charges that Mr. Rehberg had committed a burglary and aggravated assault. Mr. Burke knew that he and Mr. Paulk in conducting the investigation of Mr. Rehberg had not found any evidence that Mr. Rehberg committed a burglary or aggravated assault. While Mr. Burke's presentation of evidence to the Grand Jury may be entitled to absolute immunity as the prosecutor, his role in investigating Mr. Rehberg and fabricating evidence of a burglary and aggravated assault are not entitled to absolute immunity.

136. Mr. Burke's role in fabricating such evidence that Mr. Rehberg had somehow committed an aggravated assault and burglary violated Mr. Rehberg's constitutional rights and violated 42 U.S.C. § 1983. Mr. Burke is not entitled to qualified immunity because he violated Mr. Rehberg's established and clear constitutional rights.

137. There is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was fabricated by the government. Mr. Rehberg was subjected to criminal charges on the basis of false evidence that was fabricated.

138. The indictments of Mr. Rehberg were widely covered in the local and state press, including the Albany Herald, WALB-TV, WFXL-TV, and the Atlanta Journal. Mr. Burke conducted interviews with the press and also issued press statements in which he addressed challenges by Mr. Rehberg's counsel and stated, "[I]t is never free speech to assault or harass someone, no matter who they are and no matter how much you don't like them." Mr. Burke represented to the public and the press that Mr. Rehberg had committed an assault. Mr. Burke also publicly stated, "It would be ludicrous to say that an individual has the right to go onto someone else's property and burn a cross under the guise of free speech, which is tantamount to what these defendants are claiming." Mr. Burke's statements were published in the press. Mr. Burke publicly indicated that Mr. Rehberg illegally went onto "someone else's property" and committed an assault.

139. Despite the clear constitutional violations of Mr. Rehberg's civil rights discussed above, Mr. Burke publicly indicated that Mr. Rehberg had

committed an assault and had trespassed or committed a burglary. Injury to an individual's reputation may be a component of damages awarded under 42 U.S.C. § 1983. Mr. Burke wrongfully damaged Mr. Rehberg's reputation for which he is liable under 42 U.S.C. § 1983.

140. Moreover, under Supreme Court precedent, statements by a prosecutor such as Mr. Burke to the press are not entitled to absolute immunity. Nor are Mr. Burke's statements to the media entitled to qualified immunity.

141. Mr. Burke's violations of 42 U.S.C. §1983 caused Mr. Rehberg to suffer personal injuries and damages for which he is liable.

142. Under 42 U.S.C. 1983, Mr. Burke is liable to Mr. Rehberg for all damages allowed by law.

COUNT NINE AGAINST DEFENDANT DOUGHERTY COUNTY AND KEN HODGES IN HIS OFFICIAL CAPACITY AS DOUGHERTY COUNTY DISTRICT ATTORNEY ----VIOLATIONS OF 42 U.S.C. 1983

143. Plaintiff Mr. Rehberg repeats and incorporates the allegations of Paragraphs 1 through 60 as if fully stated herein.

144. A municipality or county or state may be held liable under § 1983 if the plaintiff shows that a "custom" or "practice" of the government entity was a "moving force" behind the constitutional deprivation.

145. Under Supreme Court precedent, local governments may be sued for constitutional deprivations visited pursuant to government "custom" even though such a custom had not received formal ap-

proval through the body's official decision-making channels.

146. Liability may be based on a claim of inadequate training or supervision when a municipality's or county's or state's failure to train or supervise its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants such that the failure to train or supervise can be properly thought of as a policy or custom that is actionable under § 1983.

147. The need for a particular type of training and supervision is obvious when employees face clear constitutional duties in recurrent situations even without prior incidents to place the municipality or county on notice. Such is the case here.

148. Dougherty County and the District Attorney's Office knew or should have known that (1) it was the common custom and practice of investigators to serve as complaining witnesses, and that (2) County investigators were doing so without adequate supervision, notice, preparation or knowledge.

149. Dougherty County and the District Attorney's Office knew or should have known of a need to supervise investigators and provide proper training regarding their legal and ethical responsibilities while serving as complaining witnesses in Grand Jury proceedings, but made a deliberate choice not to provide such supervision and training, with deliberate indifference to the rights of the accused.

150. In the original Grand Jury proceeding, only one witness testified: Mr. Paulk. Mr. Paulk is listed as the "complainant" in the indictment against Mr. Rehberg. (Paulk Dep. pp. 19-20). Mr. Paulk admitted that he told the Grand Jury, "These are true

and accurate facts based upon the indictment." *Id.* at p. 109.

151. Yet Mr. Paulk has now admitted that he never interviewed any witnesses or gathered any evidence indicating that Mr. Rehberg committed any aggravated assault or burglary. (Paulk Dep. p. 111). He has now admitted his "lack of knowledge and preparation." (Paulk Dep. p. 78). He never even interviewed the supposed recipients of the anonymous faxes who were somehow "harassed." *Id.*

152. Mr. Paulk has testified that it is "unfortunately" normal and common for him and other investigators employed by Dougherty County and working under the supervision of the District Attorney to testify without adequate notice, knowledge or preparation or personal knowledge of the facts being attested to as true.

153. Mr. Paulk faced clear constitutional duties in recurrent situations of testifying before Grand Juries. Yet he received inadequate training and supervision to protect the constitutional rights of the accused when serving as the complaining witness. In this case, Mr. Paulk testified before the Grand Jury on short notice without knowledge of any evidence indicating that Mr. Rehberg had committed any assault or burglary. Yet he attested to such charges as true.

154. Mr. Paulk is an employee of Dougherty County. He was trained and supervised by both the County and the District Attorney.

155. The failure to adequately train and supervise Mr. Paulk when he faced clear constitutional duties in recurrent situations was a moving force in the violations of Mr. Rehberg's constitutional rights.

156. Under 42 U.S.C. 1983, Dougherty County and Ken Hodges in his Official Capacity as Dougherty County District Attorney are jointly and severally liable to Mr. Rehberg for the violations of his constitutional rights.

COUNT TEN AGAINST KELLY BURKE IN HIS INDIVIDUAL CAPACITY, KEN HODGES IN HIS INDIVIDUAL CAPACITY, AND JIM PAULK IN HIS INDIVIDUAL CAPACITY ----CONSPIRACY TO VIOLATE THE CONSTITUTIONAL RIGHTS OF CHARLES REHBERG AND SECTION 1983

157. Plaintiff Charles Rehberg repeats and incorporates the allegations of paragraphs 1 through 60 as if fully stated herein and repeats and incorporates the allegations contained in Counts Six, Seven, and Eight above as if fully stated herein.

158. During the investigation and in fabricating evidence that Mr. Rehberg committed a burglary and aggravated assault, Defendants Kelly Burke, Kenneth Hodges, and James Paulk attempted to accomplish an unlawful end by unlawful means.

159. Such Defendants engaged in conduct which constitutes a tort under federal law for violations of Mr. Rehberg's constitutional rights under the First Amendment, the Fourth Amendment, and the Fourteenth Amendment of the United States Constitution.

160. For acting in concert and engaging in a conspiracy to violate Mr. Rehberg's constitutional rights, these Defendants are liable to Mr. Rehberg under 42 U.S.C. § 1983 for all damages allowed by federal law.

161. These Defendants' conduct evidences callous indifference to the federally protected rights of

Mr. Rehberg, warranting an award of punitive damages under governing federal law.

WHEREFORE, Plaintiff Charles Rehberg prays for all relief and damages as allowed by governing law under each Count of this Complaint, including compensatory damages, general dam-ages, and punitive damages as allowed by law, attorneys' fees, and all costs of this action. Mr. Rehberg also respectfully requests such further legal and equitable relief as is proper under governing law.

Jury trial is hereby demanded.

This 23rd day of January, 2007.

VROON & CRONGEYER, LLP

By: /s/ Bryan A. Vroon
Bryan A. Vroon
bvroon@vclawfirm.com
Georgia Bar No. 729086

By: /s/ John W. Crongeyer
John W. Crongeyer
jcrongeyer@vclawfirm.com
Georgia Bar No. 197267

1718 Peachtree Street, Suite 1088
Atlanta, Georgia 30309
Telephone: (404) 607-6710
Facsimile (404) 607-6711

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CHARLES A. REHBERG,

Plaintiff

V.

JAMES P. PAULK, IN HIS INDIVIDUAL CAPACITY; KENNETH B. HODGES, III, IN HIS INDIVIDUAL CAPACITY; KENNETH B. HODGES, III, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF DOUGHERTY COUNTY; KELLY R. BURKE, IN HIS INDIVIDUAL CAPACITY, AND DOUGHERTY COUNTY,

Defendants.

CIVIL ACTION FILE NO._______

VERIFICATION

1. Charles Rehberg personally appeared before the undersigned officer, duly authorized to administer oaths, who after being sworn, states under oath as follows:

2. I am over the age of majority and competent to testify.

3. I have read the Complaint in this matter. To the best of my knowledge, information, and belief formed after reasonable inquiry, the Complaint is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; that the acts forming the bases for the claims are not privileged communications under paragraph (4) of Code Section 51-5-7; and that the claims are not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to pe-

tition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation.

FURTHER AFFIANT SAYETH NOT:

Signed, sealed and delivered this 23 day
Of January, 2007 in the presence of:

Sonia E. Brice BY: /s/ Charles Rehberg
Charles Rehberg

Notary Public

[SEAL]

My Commission Expires: March 27, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

CHARLES A. REHBERG,

Plaintiff

V.

JAMES P. PAULK, IN HIS INDIVIDUAL CAPACITY; KENNETH B. HODGES, III, IN HIS INDIVIDUAL CAPACITY; KENNETH B. HODGES, III, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF DOUGHERTY COUNTY; KELLY R. BURKE, IN HIS INDIVIDUAL CAPACITY, AND DOUGHERTY COUNTY,

Defendants.

CIVIL ACTION FILE NO.________

VERIFICATION

1. Bryan A. Vroon personally appeared before the undersigned officer, duly authorized to administer oaths, who after being sworn, states under oath as follows:

2. I am over the age of majority and competent to testify. I am counsel of record for Plaintiff Charles Rehberg in this matter. I am licensed to practice law in Georgia and have been licensed since 1987. The following facts are based on my personal knowledge.

3. I have drafted and read the Complaint in this matter. To the best of my knowledge, information, and belief formed after reasonable inquiry, the Complaint is well grounded in fact and is warranted by existing law; that the acts forming the bases for the claims are not privileged communications under paragraph (4) of Code Section 51-5-7; and that the claims are not interposed for any improper purpose

such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation.

FURTHER AFFIANT SAYETH NOT:

Signed, sealed and delivered this __ day
Of January, 2007 in the presence of:

____________________ BY: /s/ Bryan A. Vroon
Notary Public Bryan A. Vroon

[SEAL]

My Commission Expires: ____________

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 10-788

Supreme Court, U.S.
FILED
JUN 9 - 2011
OFFICE OF THE CLERK

In the Supreme Court of the United States

CHARLES A. REHBERG,
Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III,
AND KELLY R. BURKE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street
Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTION PRESENTED

Whether a government official who acts as a "complaining witness" by providing false grand jury testimony leading to the initiation of a prosecution against an innocent citizen is entitled to absolute immunity—rather than qualified immunity—in a damages action under Section 1983 arising from the unjustified prosecution.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) issued on rehearing is reported at 611 F.3d 828. The panel's initial, withdrawn opinion (Pet. App. 45a-80a) is reported at 598 F.3d 1268. The opinion of the District Court for the Middle District of Georgia (Pet. App. 81a-108a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2010, upon consideration of petitioner's petition for rehearing. On October 6, 2010, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including December 13, 2010. The petition for a writ of certiorari was filed on December 13, 2010, and was granted on March 21, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

In actions for damages under 42 U.S.C. § 1983, qualified immunity is the "norm." *Malley* v. *Briggs*, 475 U.S. 335, 340 (1986) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982)). This Court has "been 'quite sparing' in recognizing absolute immunity for state actors." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 224 (1988)). And the threshold showing required for absolute immunity is that the official claiming immunity "can point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-340.

The Court held in *Malley* that a police officer was entitled to qualified immunity, but not absolute immunity, for causing an arrest warrant to issue by submitting a sworn affidavit that failed to establish probable cause. *Id.* at 343. The Court reasoned that officers who initiate prosecution in this manner function as complaining witnesses, who—unlike other witnesses—"were not absolutely immune at common law." *Id.* at 340. In *Kalina* v. *Fletcher*, 522 U.S. 118 (1997), the Court rejected a prosecutor's claim of absolute immunity for making false statements of fact in an affidavit supporting an application for an arrest warrant, reiterating that complaining witnesses "were subject to suit at common law." *Id.* at 127.

Here, respondent Paulk, an investigating officer, made false statements in his grand jury testimony that instigated the return of three grand jury indictments and petitioner's arrest on criminal charges. As in *Malley* and *Kalina*, Paulk's actions as a complaining witness are entitled to qualified immunity, but not absolute immunity.

The Court's decision in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), which extended to Section 1983 actions the common-law rule of absolute immunity for a witness's ***trial testimony*** (*id.* at 345-346), and which expressly distinguished the situation of complaining witnesses (*id.* at 328 n.5), does not justify a different result. There simply is no basis for permitting the assertion of absolute immunity when the prosecution is initiated by false information provided through oral testimony, but limiting a defendant to qualified immunity when a criminal prosecution is initiated by false statements in an affidavit. Neither the common law nor common sense justifies such inconsistent results.

A. Factual Background

This case arises from the testimony of respondent James Paulk before a state grand jury in Georgia that falsely and maliciously implicated petitioner Charles Rehberg in multiple crimes.[1]

Petitioner is a certified public accountant and certified forensic accountant who, along with a surgeon at the Phoebe Putney Hospital in Albany, Georgia, discovered evidence of the hospital's unethical billing and accounting practices. See generally J.A. 2-42 (Compl., *Rehberg* v. *Paulk*, No. 1:07-tc-05000 (M.D. Ga. 2007)). In order to raise public awareness of these practices, petitioner sent anonymous faxes publicizing the hospital's activities and financial management to members of the community, the hospital, and his Congressman. J.A. 6, 11, 30 (¶¶ 17, 31, 123). Those faxes prompted hospital management to have the Dougherty County District Attorney launch an illegal investigation of the anonymous faxes as a "favor" to the hospital. J.A. 10-12 (¶¶ 29, 33, 35).[2]

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[1] Because this case was decided on a motion to dismiss, this Court "must * * * accept all factual allegations in the complaint as true." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

[2] The District Attorney of Dougherty County was Kenneth B. Hodges, III. After unfavorable press coverage of the District Attorney's conflicts of interest in relation to the hospital, Hodges formally recused himself from the case, and Kelly R. Burke was appointed as a special prosecutor in his stead. J.A. 17-18 (¶ 54); see, *e.g.*, Andy Miller, *D.A. Aided Civil Action*, Atlanta J.-Const., May 9, 2005, at 1A ("Legal experts say the actions * * * are unusual and possibly inappropriate for a district attorney's office."). Both Hodges and Burke were named defendants below and are nominal respondents before this

Respondent Paulk was the Chief Investigator in the District Attorney's office, and led the retaliatory investigation against petitioner. J.A. 2-3, 12-15 (¶¶ 3, 34-45). Although his investigation would turn up no evidence establishing probable cause to indict petitioner (J.A. 6, 7 (¶¶ 17, 19)), respondent would nonetheless testify falsely to the contrary in front of three grand juries. Respondent's false testimony as a complaining witness (J.A. 20, 28, 29 (¶¶ 63, 112, 114, 117)), offered with full knowledge that "there was not probable cause to indict [petitioner]" (Pet. App. 11a) and in a malicious attempt to indict petitioner (J.A. 25-30 (¶¶ 96-120)), resulted in three indictments against petitioner. Petitioner was arrested and detained as a result of these indictments. Pet. App. 6a.

All of the indictments would be later dismissed as legally insufficient (J.A. 10-11 (¶ 29); Pet. App. 5a-6a), but not before inflicting significant harm on petitioner's reputation, finances, and health (J.A. 10-11 (¶ 29)).

1. The First Indictment

On December 14, 2005, petitioner was indicted on charges of aggravated assault, burglary, and harassing telephone calls. J.A. 4-5 (¶ 10). According to the indictment, petitioner allegedly: (1) burglarized the home of Dr. James Hotz (a doctor at the hospital), entering with the intent to commit assault; (2) assaulted Dr. Hotz by "suggesting that the accused had a weapon"; and (3) committed six counts of engaging in harassing telephone calls (by sending ano-

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Court, but petitioner has not sought this Court's review of his claims against Hodges and Burke.

nymous faxes to various members of the community including petitioner's Congressman). *Ibid.*

Respondent was the sole witness to testify before the grand jury; he was listed on the bill as the "complainant" against the petitioner. J.A. 6, 28-29 (¶¶ 16, 112, 114, 117); see also Pet. App. 48a (noting that the respondent was "the sole complaining witness against [petitioner]"). Respondent's testimony, however, was entirely false. There was never any probable cause to indict petitioner. J.A. 7 (¶ 19). Indeed, there was not even a police report of an assault or burglary. J.A. 5 (¶ 13). Respondent has since admitted that before testifying he "never interviewed any witness [n]or gathered any evidence indicating that [petitioner] committed any aggravated assault or burglary." J.A. 6 (¶ 17). One of the alleged recipients of the anonymous faxes did not own a fax machine and petitioner's Congressman disclaimed any assertion that petitioner harassed him. *Ibid.* On February 2, 2006, the first indictment was nol-prossed by the special prosecutor (J.A. 7-8 (¶ 21)), appointed after the District Attorney recused himself from the case (see page 3, note 2 *supra*).

2. *The Second Indictment*

After the first indictment was nol-prossed, respondent Paulk appeared before a second grand jury in another effort to indict petitioner. J.A. 8 (¶ 22). On February 16, 2006, the grand jury indicted petitioner on a charge of simple assault for "commit[ting] an act which placed James A. Hotz * * * in reasonable apprehension of immediately receiving a violent injury" (*ibid.*), and five counts of engaging in harassing telephone calls. *Ibid.*

However, for a second time, respondent Paulk's testimony was false. There was no evidence that petitioner *ever visited* Dr. Hotz's home, let alone evidence suggesting that petitioner assaulted Dr. Hotz or was a party to an assault against Dr. Hotz. *Ibid.* Indeed, there was no evidence that an assault even occurred against Dr. Hotz, who, as mentioned, never filed a police report. J.A. 8-9 (¶ 23). Further, many of the so-called "victims" of harassing faxes did not actually see themselves as victims. *Ibid.* Once again, the indictment was dismissed. J.A. 9-10 (¶¶ 24, 27).

3. The Third Indictment

On March 1, 2006—while the second indictment remained pending—respondent Paulk, acting with malice, and without probable cause (J.A. 26 (¶ 99)), and Burke appeared before a *third* grand jury and secured another indictment against petitioner, this time for "simple assault" and "harassing telephone calls." J.A. 9 (¶ 25). But, again, on May 1, 2006, after a motion from petitioner's counsel, the trial court dismissed all charges against petitioner. J.A. 9-10 (¶ 26).

B. Proceedings Below

Following the dismissal of the indictments, petitioner filed a complaint in the United States District Court for the Middle District of Georgia against respondent alleging, in addition to various state law claims, three violations of Section 1983. Pet. App. 6a-7a. Petitioner accused respondent of malicious prosecution in violation of the Fourth and Fourteenth Amendments,[3] retaliatory investigation and prosecution in violation of petitioner's First Amendment free speech rights, and conspiracy to violate petitioner's rights under the First, Fourth, and Fourteenth Amendments. Pet. App. 6a-7a.

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[3] The Eleventh Circuit recognizes a valid § 1983 claim for malicious prosecutions in violation of the Fourth Amendment.

Respondent Paulk moved to dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, among other grounds, that he was entitled to absolute immunity for his testimony before the grand jury. Paulk and Dougherty County Mem. in Support of Mot. to Dismiss, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Apr. 10, 2007).

The district court identified Paulk as a complaining witness before the grand jury (Pet. App. 83a), and denied his motion to dismiss on the ground that—apart from his grand jury testimony—Paulk's other non-testimonial acts as a complaining witness were sufficient to defeat his claim of absolute immunity (Pet. App. 98a-100a).[4]

Respondent Paulk appealed, contending in part that he was entitled to absolute immunity under this Court's decision in *Briscoe*, 460 U.S. 325, which recognized absolute immunity from Section 1983 liability for false trial testimony by a law enforcement officer. Petitioner countered that respondent was not entitled to absolute immunity, in line with this Court's decision in *Malley*, 475 U.S. 335, which denied absolute immunity for a law enforcement officer who acted as a "complaining witness" in submitting a

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See, *e.g.*, *Whiting* v. *Traylor*, 85 F.3d 581, 584-586 (11th Cir. 1996).

[4] The district court rejected respondent Paulk's qualified immunity claim because his alleged conduct violated petitioner's clearly established constitutional right. Pet. App. 101a-102a.

complaint and supporting affidavit that failed to establish probable cause.

Although acknowledging that Paulk was a "complaining witness" against petitioner (Pet. App. 4a), the court of appeals reversed the district court's denial of Paulk's absolute immunity claim (Pet. App. 12a (citing *Briscoe*, 460 U.S. at 326)). The court distinguished *Malley* on the ground that the criminal complaint at issue in that case did not implicate the secrecy concerns associated with the grand jury. Pet. App. 14a n.9. Even though it explicitly recognized that "[t]wo circuits [have] carved out a complaining-witness exception" for false grand jury testimony (Pet. App. 14a n.9), the court of appeals dismissed petitioner's Section 1983 malicious prosecution claim (Pet. App. 61a).[5]

SUMMARY OF ARGUMENT

The threshold requirement for absolute immunity is "a common-law counterpart to the privilege [the government official] asserts." *Malley*, 475 U.S. at 339-340. There is no such common-law analog here. To the contrary, this Court has recognized three times that "complaining witnesses were not absolutely immune at common law." *Id.* at 340; see also *Kalina*, 522 U.S. at 127 & n.14; *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992). The fact that respondent Paulk acted as a complaining witness by testifying before grand juries, rather than by submitting written affidavits, is irrelevant. At common law, both forms of evidence could and did give rise to liability in malicious prosecution.

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[5] Separately, the court of appeals affirmed denial of respondent's motion to dismiss petitioner's retaliatory prosecution claim. Pet. App. 34a. It also ruled that petitioner's conspiracy claim was barred by the intracorporate conspiracy doctrine. Pet. App. 43a-44a. These additional aspects of the court of appeals decision are not before this Court.

The absence of immunity at common law is dispositive of the absolute immunity claim here. The Court has stated that it "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [the Court] judge[s] to be sound public policy." *Tower* v. *Glover*, 467 U.S. 914, 922-923 (1984). But even if those considerations were relevant, they too weigh strongly against absolute immunity.

To begin with, the function performed by a complaining witness whose grand jury testimony triggers the issuance of an indictment is precisely the same as the function performed by one whose affidavit results in the issuance of an arrest warrant. In both situations, the complaining witness has initiated a criminal prosecution, subjecting the target of his or her efforts to a loss of liberty and other injuries.

This Court squarely held in *Malley* and *Kalina* that absolute immunity is not available to government officials who submit false affidavits that result in the issuance of arrest warrants. There simply is no basis for distinguishing between the two types of evidence, according absolute immunity to evidence provided orally but only qualified immunity to evidence provided in writing.

Moreover, the States differ significantly in the extent to which they require grand jury indictments to initiate criminal prosecutions. Basing the availability of absolute immunity on the procedural mechanism used to begin a criminal action would mean that Section 1983's protection against unconstitutional criminal prosecutions would turn on the particular State's procedural rules. A person victimized by malicious falsehoods could bring a claim in a State in which written affidavits were sufficient to instigate a prosecution, but absolute immunity would bar a claim from an identically situated person in a State in which an indictment was required. That distinction is entirely arbitrary.

Finally, there is no reason to believe that a rule of qualified immunity will open the door to abusive litigation. The qualified immunity principle already is applied by seven courts of appeals with respect to complaining witnesses' oral testimony, and—under this Court's decisions in *Malley* and *Kalina*—it applies nationwide with respect to affidavits and other written submissions that trigger criminal actions. Yet there is no evidence of a flood of unjustified claims. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

ARGUMENT

A COMPLAINING WITNESS IS NOT ENTITLED TO ABSOLUTE IMMUNITY FROM A SECTION 1983 WRONGFUL PROSECUTION CLAIM ARISING FROM HIS MALICIOUSLY FALSE GRAND JURY TESTIMONY.

Qualified immunity "'represents the norm'" for government officials sued under Section 1983 for acts performed in the course of their duties. *Buckley*, 509 U.S. at 273 (quoting *Malley*, 475 U.S. at 340). "'[T]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.'" *Id.* at 278 (quoting

Burns v. *Reed*, 500 U.S. 478, 486-487 (1991)); see also *Harlow*, 457 U.S. at 807 ("For executive officers in general, * * * qualified immunity represents the norm.").

This Court has for that reason been "'quite sparing in recognizing absolute immunity for state actors.'" *Buckley*, 509 U.S. at 269 (quoting *Forrester*, 484 U.S. at 224). The burden is on the official to show entitlement to more than qualified immunity. *Butz* v. *Economou*, 438 U.S. 478, 506 (1978).

The courts below did not dispute that, based on the allegations of the complaint, respondent Paulk qualifies as a "complaining witness." See Pet. App. 4a, 13a, 83a.[6] The question in this case is whether Paulk is entitled to absolute immunity because the facts that led to the initiation of the prosecutions were provided in oral testimony rather than through affidavit.

Each of the factors considered by the Court weighs strongly against absolute immunity. *First*, there was no absolute immunity for complaining witnesses at common law in 1871, when Section 1983 was enacted, even when the witness supplied information through oral testimony. *Second*, the Court has specifically rejected claims of absolute immunity with respect to the particular government function—serving as a complaining witness—on which the Section 1983 claim here is based. *Third*, the relevant public policy considerations all point sharply against distinguishing between absolute and qualified immunity for complaining witnesses based upon whether they provided information through oral testimony to a grand jury as opposed to written affidavit to a judge or magistrate.

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[6] As this Court has explained, a complaining witness is a person who provides the facts that "set the wheels of government in motion by instigating a legal action." *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992).

A. Complaining Witnesses Were Not Entitled To Common-Law Immunity In 1871.

The threshold inquiry in determining the scope of a government official's immunity in actions under Section 1983 is whether the official claiming immunity "can point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-340 (citing *Tower*, 467 U.S. at 914). "One important assumption underlying the Court's [Section 1983] decisions * * * is that members of the 42d Congress were familiar with common-law principles, * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Briscoe*, 460 U.S. at 330 (internal quotation marks omitted); see also *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) ("[T]he Court reaffirms that the defendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871" and "if application of the principle is unclear, the defendant simply loses").

Thus, in each of the contexts in which the Court has upheld a claim of absolute immunity from Section 1983 liability, it has rested that decision on the existence of a parallel immunity at common law. *Briscoe*, 460 U.S. at 330-334 (individuals who testify at trial); *Pierson* v. *Ray*, 386 U.S. 547, 553-554 (1967) (judges); *Tenney* v. *Brandhove*, 341 U.S. 367, 372-376 (1951) (legislators); see also *Imbler* v. *Pachtman*, 424 U.S. 409, 421-424 (1976) (prosecutor when functioning as an advocate, relying on post-1871 common-law developments).

And where the Court has not found such a common-law analog, it has rejected absolute immunity. *Wood* v. *Strickland*, 420 U.S. 308, 318 (1975) (school board members); *Pierson*, 386 U.S. at 555 (police officers).

This essential prerequisite for absolute immunity is not present here.

In *Malley*, this Court declined to grant absolute immunity to a law enforcement officer who submitted a criminal complaint and supporting affidavit that failed to establish probable cause. The Court determined that "complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." 475 U.S. at 340-41; see also *Kalina*, 522 U.S. at 127 & n.14 (stating that "complaining witnesses * * * were subject to suit at common law" (citing *Malley*, 475 U.S. at 340)); *Wyatt*, 504 U.S. at 164-165 (same).[7]

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[7] Justice Scalia, in his concurring opinion in *Kalina* for himself and Justice Thomas, pointed out that liability for malicious prosecution at common law extended not just to persons who "provided factual testimony" that triggered a prosecution but also to anyone who "had a role in initiating or procuring the prosecution whether or not he ever provided factual testimony." 522 U.S. at 135. The common-law immunity for witnesses "was * * * an immunity only against slander and libel actions"; a witness's false statements could be used as "evidence of malice or initiation in the malicious prosecution suit" but were not actionable independently in defamation. *Id.* at 133 (emphasis omitted). They thus agreed that a person whose false

Although *Malley* involved a complaining witness who provided information by submitting an affidavit, the common law drew no distinction between complaining witnesses who provided information in writing and those whose information came via oral testimony. Nor did the common law draw a distinction based upon whether the oral information was furnished to a magistrate or to a grand jury.

The basic principle of common-law liability for malicious prosecution was framed in general terms: "[t]he gist of the action is the criminal prosecution, instituted with malice and without probable cause, resulting in damage to the plaintiff, by depriving him of his liberty, injuring his reputation or putting him to expense." *Shaul* v. *Brown*, 28 Iowa 37, 42 (1869). Indeed, appellate court opinions ruling on suits for malicious prosecution often simply noted that the defendant had "caused" the plaintiff to be arrested or prosecuted without specifying the means by which the defendant had presented the information that led to that result. See, *e.g.*, *Tefft* v. *Windsor*, 17 Mich. 486, 491 (1869) (affirming judgment against defendants who "caus[ed] [plaintiff] to be arrested on a criminal charge").[8]

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statements triggered a prosecution were subject to liability at common law for the injury caused by the unjustified prosecution—the very injury that is the basis for the claim in this case.

[8] See also *Spain* v. *Howe*, 25 Wis. 625 (1870) (affirming judgment in malicious prosecution suit against defendant who "caused [plaintiffs] to be arrested on a civil warrant from a justice of the peace"); *Hill* v. *Palm*, 38 Mo. 13, 19 (1866) (affirming judgment against defendant who had "wilfully, maliciously, and without probable cause, caused the respondent to be prosecuted for the offence of larceny"); *William M. Ross & Co.* v. *Innis*, 35 Ill. 487, 506, 511 (1864) (affirming judgment for

There is no doubt, moreover, that a complaining witness who testified in person was treated identically to one who submitted an affidavit. For example, individuals were subject to suit for prosecutions instituted via oath or information before a magistrate. See, *e.g.*, *Kimball* v. *Bates*, 50 Me. 308, 309 (1862) (reversing judgment for a "defendant [who] made oath before the magistrate" and remanding for new trial).[9]

Courts also entertained malicious prosecution suits against those who provided oral testimony to grand juries. See, *e.g.*, *Casperson* v. *Sproule*, 39 Mo. 39, 43-44 (1866) (remanding for trial an action for malicious prosecution against a defendant who "appeared voluntarily before the grand jury and tried 'to have [plaintiff] indicted for embezzlement' * * * [upon which] 'the grand jury refused to indict * * *.'"); *Stewart* v. *Thompson*, 51 Pa. 158, 160 (1865) (affirming judgment against defendant who "procured a bill of indictment * * * to be presented to the grand jury, upon which bill he was the only witness sworn"); *Kidder* v. *Parkhurst*, 85 Mass. 393, 393-394

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plaintiff on third successful trial of the issue noting only that defendants had "caused the plaintiff to be arrested" and had "sought [plaintiff's] ruin through an infamous charge which they knew was unfounded. Such is retributive justice! The judgment is affirmed."); *Glascock* v. *Bridges*, 15 La. Ann. 672 (La. 1860) (noting only that the defendant had "caused the plaintiff to be arrested").

[9] See also *Thomas* v. *Norris*, 64 N.C. 780, 783-784 (1870) (affirming judgment against defendant for malicious prosecution instituted by swearing out a warrant that was "read over to the defendant" and presented to a magistrate); *Callahan* v. *Caffarata*, 39 Mo. 136 (1866) (affirming judgment in malicious prosecution suit against defendant who caused arrest by providing information to city police captain).

(1862) (reviewing malicious prosecution suit "alleging that the defendants had maliciously caused the female plaintiff, Mary Kidder, to be indicted and prosecuted for perjury" but concluding that malicious prosecution claim was without merit because despite acquittal there was in fact probable cause for the defendants' claim of plaintiff's perjury); *Robertson* v. *Spring*, 16 La. Ann. 252 (La. 1861) (reversing judgment for plaintiff in a malicious prosecution suit, in part because "[the complainant] *did not* appear, as a witness, before the Grand Jury, who found the true bill" (emphasis added)).

The Court's discussion in *Briscoe* of the common law immunity for witnesses' trial testimony does not undermine this conclusion. The Court specifically noted that the question presented in that case was "'[w]hether a police officer who commits perjury *during a state court criminal trial* should be granted absolute immunity from civil liability'" under Section 1983. 460 U.S. at 328 n.5 (emphasis added). And the Court explicitly declined to address the availability of absolute immunity for witnesses at any sort of pretrial proceedings. *Ibid.*

Moreover, the dissent in *Briscoe* relied on the availability at common law of malicious prosecution actions against a witness whose false testimony resulted in an unjustified arrest—"courts routinely permitted plaintiffs to bring actions alleging that the defendant had made a false and malicious accusation of a felony to a magistrate or other judicial officer." *Id.* at 351 (Marshall, J., dissenting). The Court responded that "[t]he availability of a common-law action for false accusations of crime is inapposite because petitioners present only the question of § 1983 liability for false testimony during a state court criminal trial." *Id.* at 331 n.9 (internal citation omitted).[10] Thus, the *Briscoe* Court itself made clear that its analysis did not apply to complaining witnesses.

Because the absence of common-law immunity recognized by the Court in *Malley* applied equally to all complaining witnesses, including those who provided information through oral testimony—and nothing in *Briscoe* supports a different conclusion regarding the state of the common law—the predicate for a grant of absolute immunity is lacking here (just as it was also lacking in *Malley*). "Since [Section 1983] on its face does not provide for *any* immunities, [the Court] would be going too far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Malley*, 475 U.S. at 342. Complaining witnesses are therefore entitled only to the qualified immunity generally available to government officials.

B. This Court Has Twice Held That The Function Performed By A Complaining Witness Warrants Qualified Immunity.

The absence of a common-law privilege is dispositive of the claim of absolute immunity here.

But even if the Court were to conclude, contrary to our submission, that there could be a common-law basis for absolute immunity, the Court "do[es] not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form." *Malley*, 475 U.S. at 340. Rather it considers "whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Ibid*.

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[10] For these reasons, the *Briscoe* Court's use of the terms "judicial proceeding" and "judicial process" (see, *e.g.*, 460 U.S. at 334, 335) must be understood as referring to criminal trials. See *id.* at 335 ("The common law's protection for judges and prosecutors formed part of a 'cluster of immunities protecting the various participants in judge-supervised trials,' which stemmed 'from the characteristics of the judicial process.'" (quoting *Butz*, 438 U.S. at 512)).

One line of inquiry in the Court's decisions is whether the function performed by the government official is one that requires absolute immunity. The Court's precedents with respect to complaining witnesses make clear that only qualified immunity is appropriate with respect to that function.

First, there is no useful parallel to be drawn between complaining witnesses who provide information through testimony before a grand jury and the grant of absolute immunity afforded to prosecutors. Indeed, the Court specifically rejected such a rationale in *Kalina*, holding that a prosecutor who acts as a complaining witness is *not* entitled to absolute immunity. 522 U.S. at 131.

The deputy prosecuting attorney in *Kalina* "commenced a criminal proceeding against respondent by filing * * * documents" including a probable cause certification—"an affidavit or sworn testimony establishing the grounds for issuing the [arrest] warrant." *Id.* at 121 (citation omitted). The plaintiff based his Section 1983 claim on the false statements of fact in that sworn statement.

This Court stated that a prosecutor's absolute immunity rests on "the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings." *Id.* at 125; see also *id.* at 131 ("[T]he prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate.").

The Court concluded that the act of the prosecutor in "personally attesting to the truth of the averments in the certification" did not fall within the role of advocate. *Id.* at 129. "Testifying about facts is the function of the witness, not of the lawyer. * * * [T]he evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness." *Id.* at 130-131.[11] For that reason, the Court concluded, absolute prosecutorial immunity did not apply. *Id.* at 131.

Similarly, the Court in *Malley* rejected the defendant police officer's argument that he was entitled to absolute immunity because the function he was performing—supplying facts through an affidavit in order to obtain an arrest warrant—was similar to that of a prosecutor. 475 U.S. at 342. The Court declared that an officer's application for a warrant "is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.* at 342-343.

The Court also observed that absolute immunity is accorded to a prosecutor for the act of seeking an indictment because that is "but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work * * *. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process." *Id.* at 343.

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[11] See also *Kalina*, 522 U.S. at 129-130 ("Although the law required that [certification of probable cause] to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed.").

Kalina and *Malley* make clear that a prosecutor's absolute immunity is tied to his or her role as a lawyer and advocate—rather than an investigator or fact witness—in criminal proceedings.[12] There accordingly can be no basis for extending prosecutors' absolute immunity to a complaining witness—something that *Kalina* squarely rejects.

Second, absolute immunity for complaining witnesses cannot be justified by analogy to the function performed by a witness who testifies at a criminal trial.

As we have discussed (see page 16 *supra*), the Court in *Briscoe* explicitly limited its decision to trial testimony and *excluded* complaining witnesses.

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[12] See also *Buckley*, 509 U.S. 259 (granting only qualified immunity to a prosecutor engaged in an investigatory function and in making false statements in the public announcement of an indictment); *Burns*, 500 U.S. at 495-496 (denying absolute immunity for performing functions other than those intimately associated with the judicial process—like giving legal advice to the police); *cf. Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009) (granting absolute prosecutorial immunity in a § 1983 suit against a prosecutor for failure to disclose impeachment material); *Burns*, 500 U.S. at 487 (granting absolute immunity for participating as a prosecutor and advocate in a probable cause hearing).

There accordingly is no basis for extending *Briscoe* to the context that the Court specifically excluded.

Moreover, the Court's rationale in *Briscoe* was closely tied to the nature of the proceedings: "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury." *Id.* at 342. Grand jury testimony, of course, does not include the critical check of cross-examination. Nor is the defendant able to put on his own evidence to challenge the veracity of a witness's testimony.

Briscoe's inapplicability to complaining witnesses is confirmed by the Court's subsequent decisions in *Kalina* and *Malley*. *Kalina*'s determination that the prosecutor was not entitled to absolute immunity because "the only function that she performs in giving sworn testimony is that of a witness" (522 U.S. at 131) would make no sense if every individual acting as a witness were entitled to absolute immunity. See also *Malley*, 475 U.S. at 342-45 (finding only qualified immunity appropriate for officer's written testimony in support of warrant). The only possible conclusion is that *Briscoe* does not extend so broadly and, in particular, does not encompass complaining witnesses.

Indeed, that distinction comports fully with the Court's "functional" analysis, because complaining witnesses perform a function very different from witnesses at trial. A complaining witness does not simply supply facts for the consideration of a judge or jury; rather, he or she provides the facts that "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-165. As the

Second Circuit observed in denying absolute immunity for false testimony by a police officer before a grand jury, there is a "subtle but crucial" common-law distinction between witnesses "whose role was limited to providing testimony" and those, like the officer testifying before the grand jury, "who played a role in initiating a prosecution—complaining witnesses." *White* v. *Frank*, 855 F.2d 956, 958-959 (2d Cir. 1988).

The common law concluded that that very different function warranted a different immunity rule—replacing the absolute immunity afforded witnesses in the defamation context with a rule of qualified immunity that permitted liability for malicious prosecution upon a showing of malice and a lack of probable cause. See Eugene Scalia, Comment, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1446 (1989) (at common law, "the relation between witness immunity and malicious prosecution represented a delicate balancing of individual and social interests"). Qualified—rather than absolute—immunity is also appropriate in actions under Section 1983.

C. The Relevant Policy Considerations Preclude Absolute Immunity For Complaining Witnesses That Testify Before A Grand Jury.

Where there is no common-law tradition of absolute immunity for a particular official function, this Court's inquiry is at its end—considerations of public policy alone cannot justify recognition of a Section 1983 immunity. See *Tower*, 467 U.S. at 922-923 ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."). In any event, there is no sound policy basis for granting absolute immunity to complaining witnesses who testify before a grand jury.

1. *Distinguishing Between Prosecutions Initiated By Grand Jury Indictment And Prosecutions Initiated By Warrant Or Information Produces Absurd And Arbitrary Results.*

Distinguishing for purposes of Section 1983 immunity between prosecutions initiated by grand jury indictment and those initiated by arrest warrant or information simply makes no sense. Although these charging instruments vary in their procedural details, they have the same effect: initiating a criminal proceeding. It therefore would be entirely arbitrary for the nature of the immunity provided to a complaining witness to depend on whether the complaining witness gave oral testimony before a grand jury or submitted a written affidavit in court.

The States differ significantly in the degree to which they require grand jury indictments to initiate a criminal prosecution.[13] Twenty-two States require a grand jury indictment for certain serious crimes, but allow prosecution by information for other offenses.[14] Twenty-six States permit the use of either indictment or information for all crimes.[15] Two States have effectively abolished the indicting grand jury by repealing the statutory provisions providing for their empanelment, and now use grand juries only for investigatory purposes.[16] Thus, in all but those two States, prosecutors have their choice of charging instrument—indictment or information—when prosecuting at least some class of crimes.

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[13] In *Hurtado* v. *California*, 110 U.S. 516 (1884), this Court declined to incorporate the Fifth Amendment Grand Jury Clause against the States, leaving individual States to decide whether and when to require a grand jury indictment to initiate a prosecution.

[14] Eighteen States follow the federal system in requiring grand jury indictment for crimes meeting the traditional definition of felonies: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Wayne R.

For that reason, distinguishing between prosecutions initiated by grand jury and those initiated by information would lead to grants of immunity to some complaining witnesses, but not to others, based solely on whether the prosecutor proceeded by indictment or not. Where the effect of the complaining witness's actions is the same—initiating a prosecution—there is no basis for providing absolute immunity in some cases and qualified immunity in others, based solely on the procedural method used to initiate the prosecution.

2. *The Policy Justifications Recognized In* Malley *And* Kalina *Apply Equally To Grand Jury Testimony.*

This Court recognized in *Malley* that official abuse of the judicial process harms innocent citizens,

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LaFave et al., 4 Crim. Proc. § 15.1(d) (3d ed. 2010). Four States require grand jury indictment only for the most serious crimes, usually those carrying a penalty of death or life in prison: Florida, Louisiana, Minnesota, and Rhode Island. *Id.* § 15.1(e).

[15] Those States are: Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.* § 15.1(g).

[16] These States are Connecticut and Pennsylvania. See *id.* § 15.1(g), n.346.

wastes judicial resources, and undermines the legitimacy of the criminal justice system. 475 U.S. at 343-344 ("Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or * * * benefit the guilty."). These concerns apply with no less force to prosecutions initiated by grand jury indictment than to prosecutions initiated by any other means.

Indeed, "the [Section 1983] remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason." *Id.* at 344. And, it may cause a public official—in that case a police officer—to reflect before making a complaint: "such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature." *Id.* at 343.

Victims of malicious prosecutions initiated through false grand jury testimony are no less deserving of a remedy than victims of arrests based on false affidavits. And the public interest in deterring such behavior is no less vital. Limiting a complaining witness to qualified immunity when the witness provides oral testimony rather than a written complaint serves as an appropriate check against illegitimate manipulation of the charging process.

Moreover, the policy justification relied upon to support absolute immunity in *Briscoe* is wholly inapplicable here. The *Briscoe* Court wrote that "the truth-finding process is better served if the witness's testimony is submitted to 'the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies.'" 460 U.S. at 333-334 (quoting *Imbler*, 424 U.S. at 440 (White, J., concurring in the judgment)).

That policy rationale relies on the transparency and adversarial nature of a criminal trial. But grand juries have neither of these features. Prosecutors generally have no obligation to present exculpatory evidence to the grand jury, grand jurors may consider evidence that would be inadmissible at trial, and defendants ordinarily have no right to testify, cross-examine witnesses, or introduce evidence, or even to be present for any part of the grand jury proceedings. See Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L.J. 323, 328 (2004). Without civil liability for complaining witnesses, therefore, the distorting effects of false testimony before the grand jury could well go unchecked.

Finally, there is no reason to believe that a rule of qualified immunity will lead to abusive litigation. The Court observed in *Malley* that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341. Indeed, the qualified immunity standard has been applied to claims against complaining witnesses who testify falsely before grand juries in seven judicial circuits—the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia[17]—and there is no evidence that the qualified immunity standard has been unable to provide a means of quickly disposing of unjustified claims. Similarly, there is no evidence that this Court's decisions in ***Malley*** and ***Kalina*** have opened the floodgates for claims against complaining witnesses acting through written testimony.

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[17] See, *e.g.*, *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Kulas* v. *Flores*, 255 F.3d 780, 783 n.1 (9th Cir. 2001); *Curtis* v. *Bembenek*, 48 F.3d 281, 285 n.5 (7th Cir. 1995); *Enlow* v. *Tishomingo County, Miss.*, 962 F.2d 501, 511 & n.29 (5th Cir. 1992); *Anthony* v. *Baker*, 955 F.2d 1395, 1399-1401 (10th Cir. 1992); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415,

The relevant policy considerations therefore provide no basis for creating a new rule of absolute immunity. To the contrary, they strongly favor application of the well-settled rule of qualified immunity to complaining witnesses who testify orally as well as to those who provide evidence in writing.

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419 (D.C. Cir. 1991); *White*, 855 F.2d at 961; see also *Harris* v. *Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997) (extending the complaining witness exception to *trial* testimony).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street
Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

JUNE 2011

RESPONDENT'S
BRIEF

No. 10-788

In The
Supreme Court of the United States

◆

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III,
and KELLY R. BURKE,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

◆

BRIEF FOR RESPONDENT JAMES P. PAULK

◆

THEODORE FREEMAN
SUN S. CHOY
JACOB E. DALY
FREEMAN MATHIS &
GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339
(770) 818-0000

JOHN C. JONES
Counsel of Record
248 Roswell Street
Marietta, GA 30060
(770) 427-8066
jcjones1234@bellsouth.net

Counsel for Respondent James P. Paulk

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a government official is entitled to absolute immunity for testimony presented to a grand jury.

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OPINIONS AND JUDGMENTS BELOW

On March 31, 2009, the United States District Court for the Middle District of Georgia entered an order denying Paulk's motion to dismiss. The district court's opinion is not reported, but it is reproduced in the appendix to Rehberg's petition for writ of certiorari. (Pet. App. at 81a-108a.) On March 11, 2010, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming in part and reversing in part the district court's order. *Rehberg v. Paulk*, 598 F.3d 1268 (11th Cir. 2010). On July 16, 2010, the Eleventh Circuit granted Rehberg's petition for rehearing insofar as it sought panel rehearing, vacated its March 11, 2010 opinion, and issued a substitute opinion. *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010). It is the Eleventh Circuit's July 16, 2010 opinion from which Rehberg appeals.

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STATEMENT OF JURISDICTION

The Eleventh Circuit had appellate jurisdiction over Paulk's initial appeal because the district court's March 31, 2009 order was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982); *see also Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

On December 13, 2010, Rehberg filed his petition for writ of certiorari pursuant to an extension of time granted by Justice Thomas. On February 1, 2011, Paulk filed his response to Rehberg's petition pursuant to an extension of time granted by the Clerk. Rehberg filed his reply in support of his petition on February 16, 2011. On March 21, 2011, the Court granted Rehberg's petition. *Rehberg v. Paulk*, 131 S. Ct. 1678 (2011).

Paulk agrees that the Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rehberg seeks damages from Paulk pursuant to 42 U.S.C. § 1983 based on alleged violations of Rehberg's rights under the Fourth and Fourteenth Amendments to the United States Constitution.[1]

The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

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[1] Rehberg also alleges that Paulk violated his rights under the First Amendment, but that claim is not involved in this appeal.

The Fourteenth Amendment provides, in pertinent part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. XIV, § 1.

Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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STATEMENT OF THE CASE

Because the issue in this case was decided by the courts below in the context of a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), the allegations in Rehberg's complaint establish the relevant facts for purposes of this appeal. Not all of the allegations must be accepted as true; well-pleaded factual allegations are assumed to be true, but legal conclusions are not. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1950; *see also Twombly*, 550 U.S. at 556-57.

Viewed under this standard,[2] Rehberg's complaint shows the following facts relevant to the question presented: Between September 2003 and March 2004, Rehberg sent anonymous faxes to various people criticizing and parodying the management and activities of Phoebe Putney Memorial Hospital in Albany, Georgia. (J.A. at 11.) Ken Hodges, the district attorney for the circuit that includes Albany, agreed to investigate the anonymous faxes as a favor to the hospital, and so he had his chief investigator, James Paulk, prepare and send several subpoenas to BellSouth, Alltel, and Sprint for records relating to certain telephone numbers. (J.A. at 12-13.) Paulk also prepared and sent a subpoena to Exact Advertising, an internet service provider, for e-mail messages sent from and received by Rehberg's personal computer. (J.A. at 12-13.) Paulk prepared and sent these subpoenas in late 2003 and early 2004. (J.A. at 12-13.)

Following unfavorable media reports, Hodges formally recused himself from the investigation but remained involved privately. (J.A. at 17-18.) In his place, Kelly Burke was appointed as a special prosecutor. (J.A. at 17-18, 32.) On December 14, 2005, a grand jury indicted Rehberg for aggravated assault, burglary, and making harassing telephone calls (i.e., the anonymous faxes). (J.A. at 4-5.) The complaint does not identify any specific testimony that was presented to the grand jury, but Paulk was the only witness who testified. (J.A. at 6.) The aggravated assault and burglary charges related to an allegation that Rehberg had unlawfully entered the home of Dr. James Hotz with the intent to commit aggravated assault. (J.A. at 4-5.) In fact, Rehberg had never been to Hotz's home, and Hotz never reported any assault or burglary to the police. (J.A. at 5.) Rehberg's attorney challenged the sufficiency of the indictment, and Burke dismissed it on February 6, 2006. (J.A. at 7-8.)

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[2] Rehberg's complaint is rife with legal conclusions and other conclusory, non-factual allegations.

On February 16, 2006, the grand jury again indicted Rehberg, this time for simple assault (again with respect to Hotz) and making harassing telephone calls (i.e., the anonymous faxes). (J.A. at 8.) This time, both Paulk and Hotz testified before the grand jury. (J.A. at 8.) Rehberg's attorney again challenged the sufficiency of the indictment, and during a hearing on April 10, 2006, Burke told the judge that he would dismiss the indictment. (J.A. at 9.) Burke did not do so, and so the judge dismissed the indictment on July 7, 2006. (J.A. at 9.)

Meanwhile, Paulk testified before the grand jury for a third time on March 1, 2006, and the grand jury again indicted Rehberg for simple assault (presumably with respect to Hotz; the complaint is not clear) and making harassing telephone calls (i.e., the anonymous faxes). (J.A. at 9.) The judge dismissed this indictment on May 1, 2006. (J.A. at 9-10.)

The complaint does not specify exactly what Paulk's testimony to the grand jury consisted of. All the complaint says is that Paulk's testimony was false. (J.A. at 29.) Rehberg unduly emphasizes the fact that Paulk testified before the grand jury about matters of which he had no personal knowledge and that Paulk did not personally investigate or interview any witnesses. (J.A. at 6, 7, 15, 20, 21, 26-27, 35, 36.) Of course, there is no federal constitutional prohibition on testifying before a grand jury on the basis of hearsay or other evidence that would be inadmissible at trial. *United States v. Calandra*, 414 U.S. 338, 347-52 (1974) (holding that a grand jury may consider evidence obtained in violation of the Fourth Amendment); *Costello v. United States*, 350 U.S. 359, 363-64 (1956) (holding that a grand jury may consider hearsay). Georgia law also allows a grand jury to consider evidence that would be inadmissible at trial. *Ward v. State*, 706 S.E.2d 430, 434 (Ga. 2011) (holding that "a plea in abatement on the ground that [the indictment] was found on insufficient evidence, or illegal evidence, or no evidence, will not be sustained, because it comes under the rule that no inquiry into the sufficiency or legality of the evidence is indulged"). Thus, Paulk did nothing wrong by testifying on the basis of information provided by others. In that regard, it is important to recognize what the complaint does not allege:

> In contrast, there is no allegation of any physical or expert evidence that Hodges or Paulk fabricated or planted. There is no allegation of a pre-indictment document such as a false affidavit or false certification. Rather, Hodges and Paulk are accused of fabricating together only the testimony Paulk later gave to the grand jury. No evidence existed until Paulk actually testified to the grand jury. Stated differently, the only evidence Rehberg alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity.

Rehberg, 611 F.3d at 841-42.[3] It is also important to recognize that Hodges and Burke directed Paulk to testify before the grand jury and told him what to say. (J.A. at 28, 32.)

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[3] This is precisely why there is no need for the Court to remand the case for the lower courts to consider whether Paulk's non-testimonial conduct can support Rehberg's claim for malicious prosecution, as the Solicitor General urges in his amicus curiae brief. With respect to instigating the prosecution, Rehberg does not allege that Paulk did anything other than testify falsely before the grand jury, and so there is no non-testimonial conduct upon which Rehberg's claim for malicious prosecution could be based. Paulk's involvement with the subpoenas for Rehberg's telephone records and e-mail messages was not part of any "prosecution," as that term is defined by Georgia law. *See* GA. CODE ANN. § 16-1-3(14). Moreover, Rehberg waived this argument by not including it in his initial brief. Regardless, whether the Court remands the case is immaterial since the case must return to the district court in any event for further proceedings relating to the claims that were not dismissed as a result of the district court's or the Eleventh Circuit's rulings.

On January 23, 2007, Rehberg filed his complaint in the United States District Court for the Middle District of Georgia. Counts I-IV allege state-law claims against Paulk for negligence, negligence per se, and invasion of privacy, (J.A. at 19-24), and Count V alleges that Dougherty County is vicariously liable for Paulk's torts under the doctrine of respondeat superior. (J.A. at 24-25.) Counts VI and VII allege claims under Section 1983 against Paulk and Hodges for malicious prosecution and retaliatory investigation and prosecution. (J.A. at 25-31.) Count VIII alleges that Burke violated Rehberg's constitutional rights by participating in the presentation of false testimony to the grand jury and by making statements to the media that damaged Rehberg's reputation. (J.A. at 32-34.) Count IX alleges that Dougherty County and Hodges, in his official capacity, are liable under Section 1983 for maintaining a policy, custom, or practice of having investigators testify before grand juries without adequate training, supervision, notice, preparation, or knowledge. (J.A. at 34-37.) Finally, Count X alleges that Paulk, Hodges, and Burke are liable for conspiring to violate Rehberg's constitutional rights. (J.A. at 37-38.)

Paulk and Dougherty County filed a motion to dismiss, and Hodges and Burke filed a separate motion to dismiss. While the motions were pending, Rehberg withdrew Count V. (Pet. App. at 107a.) On March 31, 2009, the district court entered an order dismissing Count IX but denying the motions in all other respects. (Pet. App. at 81a-108a.)

Paulk, Hodges, and Burke filed an interlocutory appeal in which they challenged the district court's denial of absolute and qualified immunity on Counts VI, VII, VIII, and X. Paulk did not appeal the district court's rulings on Counts I-IV, and Rehberg did not appeal the district court's dismissal of Count IX. Thus, only the district court's rulings on Counts VI, VII, VIII, and X were at issue in the Eleventh Circuit. *Rehberg*, 611 F.3d at 836-37 & nn.3-4. The Eleventh Circuit reversed on Counts VI, VIII, and X, and it reversed in part and affirmed in part on Count VII. Thus, the only surviving claim after the Eleventh Circuit's decision was Count VII, but only insofar as it alleged retaliatory prosecution against Paulk. *Id.* at 855.

The only issue upon which Rehberg sought certiorari in this Court was whether the Eleventh Circuit correctly ruled that Paulk is entitled to absolute immunity for Count VI insofar as his testimony before the grand jury is concerned. Rehberg has not challenged any other aspect of the Eleventh Circuit's decision.

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SUMMARY OF THE ARGUMENT

Paulk is entitled to absolute immunity for his allegedly false testimony before the grand jury. The guiding principle is that government officials performing functions that are intimately associated with the judicial phase of the criminal process are entitled to absolute immunity. Historically, witnesses who testified in judicial proceedings were accorded absolute immunity for their testimony, and the Court has applied this rule to confer absolute immunity for their testimony at trial. Trials are the most obvious example of a judicial proceeding, and they are intimately associated with the judicial phase of the criminal process.

Grand jury proceedings are also judicial proceedings, and so the historical basis for absolute witness immunity applies equally to grand jury testimony. Despite this matter of historical fact, Rehberg contends that Paulk is not entitled to absolute immunity because he testified before the grand jury as a "complaining witness." Although the Court has held, in a factually distinguishable case, that complaining witnesses are not entitled to absolute immunity, that case does not control the outcome here because it did not involve testimonial immunity and because the common-law concept of a complaining witness does not apply to government officials in today's system of public prosecution. In fact, most federal circuit courts have extended absolute witness immunity for trial testimony to testimony given at grand jury proceedings and other pretrial proceedings.

To be sure, grand jury proceedings are not the same as trials, but they are first cousins. In each, witnesses are subpoenaed to testify under oath and are subject to prosecution for perjury if they testify falsely. There is no presiding judge and no defense attorney to cross-examine the prosecution's witnesses, but prosecutors owe an ethical duty to seek justice separate from their ethical duty to seek convictions. Moreover, the grand jury itself acts as a check on the prosecutor, and the grand jurors may "cross-examine" the prosecution's witnesses, request additional witnesses or evidence, or refuse to indict if they believe the evidence is insufficient. In contrast, a proceeding for an arrest warrant application, which is the context in which the case regarding complaining witnesses arose, are a far cry from this. Given the similarities between grand jury proceedings and trials, there is little room to doubt that grand jury proceedings are intimately associated with the judicial phase of the criminal process. As such, government officials who testify in grand jury proceedings should have absolute immunity for their testimony.

Even if the Court adheres to the common-law concept of a complaining witness, a government official like Paulk does not fall into this category because he is not a private person or a victim of the alleged crime. As an investigator for a public prosecutor, Paulk could not initiate the prosecution of Rehberg as that term was used in 1871. At that time, the victim of a crime prosecuted the perpetrator at his own expense. Nor can Paulk initiate a prosecution today, as only the public prosecutor is authorized to do so under Georgia law.

Although investigators hired by and accountable to public prosecutors did not exist in 1871, that does not mean they are not entitled to absolute immunity now. There are several examples of the Court conferring immunity under Section 1983 where none existed in the 1871 common law. For example, public prosecutors were largely unknown in 1871, but the Court has nevertheless held that they are entitled to absolute immunity, at least for their prosecutorial functions. Absolute immunity for judges today is not the same as the immunity which was accorded them before 1871. The Court has also extended the scope of qualified immunity for executive officials from the law as it existed in 1871. Finally, the Court has conferred absolute immunity on hearing examiners, administrative law judges, and regional legislators, even though those officials did not exist in 1871.

From a policy standpoint as well, Paulk should have absolute immunity for his grand jury testimony. As with trial witnesses, conferring absolute immunity on grand jury witnesses would protect against self-censorship. Witnesses who know that they could be sued for testifying before a grand jury might refuse to testify or might shade their testimony in the hope of avoiding damages liability. They might refuse to testify about anything save those facts of which they have personal knowledge, thereby greatly expanding the proceedings through a parade of witnesses before the grand jury. Either would be harmful to the judicial process. Subjecting government officials to potential damages liability for their grand jury testimony could also impair their ability to perform their jobs effectively by distracting them from their official duties. While absolute immunity for grand jury testimony allows for the possibility of unjust indictments, the Court has determined that this possibility is preferable to impairing the integrity of the judicial process.

In addition to these policy considerations, making a witness's immunity contingent on whether he is characterized as a "complaining witness" is fraught with practical difficulties. It would be an almost-impossible task for courts to determine the character of a witness without full-blown discovery and perhaps even a trial, but this would defeat the purpose of immunity and the policy of secrecy in grand jury proceedings. But all of this is not necessary since there are sufficient protections in place to deter false testimony in grand jury proceedings. Civil damages liability is not the answer. Government officials who give false testimony before a grand jury are subject to prosecution for perjury, just like witnesses who give false testimony at trial. They are also subject to federal criminal prosecution for violating the criminal defendant's constitutional rights.

For all of these reasons, the Court should affirm the Eleventh Circuit and hold that Paulk is entitled to absolute immunity for his testimony before the grand jury.

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ARGUMENT

The issue for the Court to decide is whether Paulk has absolute immunity for the allegedly false testimony he gave to the grand jury. Taking into account the historical context, precedent, logic, and policy considerations, the Court should conclude that Paulk has absolute immunity from civil liability for Rehberg's Section 1983 claim for malicious prosecution (Count VI).[4] Accordingly, the Court should affirm the judgment of the Eleventh Circuit.

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[4] The antecedent question is whether a constitutional claim for malicious prosecution is cognizable. This issue was not raised in or decided by the lower courts because it was not necessary to do so in light of the binding Eleventh Circuit precedent on the question presented, and Paulk recognizes that the Court did not grant certiorari on this issue. However, it is worth noting that it is not at all clear that such a claim exists. In *Albright v. Oliver*, 510 U.S. 266 (1994), a majority of the Court found no protection from malicious prosecution in the Fourteenth Amendment but did not decide whether such a claim would be cognizable under the Fourth Amendment. *Id.* at 275; *id.* at 281-86 (Kennedy and Thomas, JJ., concurring in the judgment); *id.* at 286-91 (Souter, J., concurring in the judgment). More recently, in *Wallace v. Kato*, 549 U.S. 384 (2007), the Court observed that it had "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983," and it did not do so in that case. *Id.* at 390 n.2. Rehberg asserts in a footnote that the Eleventh Circuit recognizes a Fourth Amendment claim for malicious prosecution, but this is a bit of a mischaracterization. In fact, what the Eleventh Circuit has recognized is that "a federal 'right' to be free from malicious prosecution is actually a description of the right to be free from an unlawful seizure which is part of a prosecution." *Whiting v. Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996). As the Eleventh Circuit implied in *Whiting*, there is no constitutional claim for malicious prosecution as such. Instead, what matters is whether a plaintiff alleges the violation of a specific constitutional right, such as the right to be free from unreasonable seizure. The Fifth Circuit has analyzed this issue, including a survey of how the circuit courts have

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I. HISTORY, PRECEDENT, AND LOGIC SHOW THAT GOVERNMENT OFFICIALS SHOULD HAVE ABSOLUTE IMMUNITY FOR THEIR GRAND JURY TESTIMONY

Although Section 1983, on its face, does not suggest the existence of any immunities, the Court has consistently recognized that "Congress did not intend § 1983 to abrogate immunities well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (internal quotation marks omitted).

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struggled with this issue, and has concluded that "no such freestanding constitutional right to be free from malicious prosecution exists." *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc); *see also* 1 SHELDON NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3.63 (4th ed. 1997 & Supp. 2010) ("Thus, strictly speaking, it is incorrect to talk about a § 1983 malicious prosecution . . . action premised solely on state tort law elements."); 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 3.18[A], at 3-596.5 (4th ed. 2003 & Supp. 2011) ("Thus, the mere fact that official conduct gives rise to a claim for relief under common-law malicious prosecution principles does not necessarily mean that the conduct is also actionable under § 1983."); Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 139 (2010) ("Even more problematic, it is far from clear that malicious prosecution is an actionable constitutional tort.") [hereinafter Rosenthal, *Second Thoughts*]. Thus, while some circuit courts have been inexact in explaining the contours of a claim like Count VI in Rehberg's complaint, to the extent they recognize such a claim based only on its common-law elements, they are incorrect. If this claim exists, it must exist as a specific constitutional claim. In the context of this case, if Rehberg alleges that he was unconstitutionally arrested because of Paulk's testimony before the grand jury, then he would be alleging a Fourth Amendment claim for unreasonable seizure.

"If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871 . . . we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).

In determining whether a particular government official's conduct is entitled to absolute or qualified immunity, the Court employs a functional approach, "which looks to the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (internal quotation marks omitted). Government officials performing functions that are "intimately associated with the judicial phase of the criminal process" are entitled to absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Absolute immunity is conferred for such functions, "not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). As explained by Judge Learned Hand, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

Under this methodology, Paulk is entitled to absolute immunity for his allegedly false testimony before the grand jury because the common law of 1871 provided absolute immunity for testimony which was provided in judicial proceedings. It is beyond question that grand jury proceedings are judicial proceedings and, as such, are intimately associated with the judicial phase of the criminal process. *Burns v. Reed*, 500 U.S. 478, 490 (1991) (noting that grand juries perform a judicial function); *United States v. Mandujano*, 425 U.S. 564, 576 (1976) (noting that grand jury investigations are a type of judicial proceeding); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) (noting that the grand jury is a part of the judicial process and that a grand jury proceeding is a judicial inquiry); Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 488 n.78 (1909) ("The proceedings of a grand jury are unquestionably judicial in character."). Georgia law also characterizes grand jury proceedings as judicial proceedings. *Decatur County v. Bainbridge Post Searchlight, Inc.*, 632 S.E.2d 113, 117 (Ga. 2006) (Melton, J., dissenting); *Darnell v. State*, 11 S.E.2d 692, 694 (Ga. Ct. App. 1940).

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Court considered whether a police officer who gives perjured testimony at a criminal trial is entitled to absolute immunity for a subsequent damages claim under Section 1983. Noting that "the common law provided absolute immunity from subsequent damages liability for all persons – governmental or otherwise – who were integral parts of the judicial process," *id.* at 335, the Court held that absolute witness immunity would continue to apply in claims under Section 1983, especially since there was no evidence showing that Congress intended to abrogate this immunity when it enacted Section 1983. *Id.* at 334-41. As the Court explained, witnesses perform a different function at trial than judges and prosecutors, but their "participation in bringing the litigation to a just – *or possibly unjust* – conclusion is equally indispensable." *Id.* at 345-46 (emphasis added).[5]

Although the Court's decision in *Briscoe* was limited to whether a witness is entitled to absolute immunity for testimony offered at trial, *id.* at 328 n.5, its reasoning suggests that the same immunity would apply to testimony offered at pretrial proceedings, including grand jury proceedings. The Court's assessment of the 1871 common law was that it absolutely immunized witnesses for testifying in "judicial proceedings," and as explained above, grand jury proceedings are judicial proceedings. Following *Briscoe*, most federal circuit courts extended its rationale to confer absolute immunity on witnesses who testify at grand jury proceedings and other pretrial proceedings. *See, e.g.*, *Lyles v. Sparks*, 79 F.3d 372, 378 (4th Cir. 1996); *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 16 (1st Cir. 1992);[6] *Grant v.*

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[5] The Court also found several policy reasons to support absolute witness immunity. Those policies are discussed below in Part II of Paulk's argument.

[6] Justice Breyer was on the panel of the First Circuit that decided *Kyricopoulos*.

Hollenbach, 870 F.2d 1135, 1139 (6th Cir. 1989); *Strength v. Hubert*, 854 F.2d 421, 423-25 (11th Cir. 1988) (per curiam); *Williams v. Hepting*, 844 F.2d 138, 140-43 (3d Cir. 1988); *Holt v. Castaneda*, 832 F.2d 123, 124-27 (9th Cir. 1987); *Kincaid v. Eberle*, 712 F.2d 1023, 1023-24 (7th Cir. 1983) (per curiam); *Briggs v. Goodwin*, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983);[7] *see also* 1A SCHWARTZ, SECTION 1983 LITIGATION § 9.07[C][2], at 9-178 to -179 ("The lower courts, however, have tended to give *Briscoe* an expansive interpretation. The great weight of lower court authority, applying the functional approach, holds that absolute witness immunity applies to testimony given at the grand jury and at adversarial pretrial criminal proceedings.").

Rehberg contends that *Briscoe* is inapplicable and that this case is instead controlled by *Malley*. In *Malley*, the plaintiffs alleged that they were unconstitutionally arrested pursuant to an affidavit that failed to establish probable cause. The police officer who submitted the affidavit to the judge sought absolute immunity, but the Court rejected this claim because "complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Id.* at 340-41.

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[7] Justice Ginsburg was on the panel of the District of Columbia Circuit that decided *Briggs*.

Contrary to Rehberg's argument, *Malley* does not control the outcome of this case. First, and most obviously, *Malley* did not involve an assertion of testimonial immunity as Paulk has asserted here. While it is true that the police officer in *Malley* argued that he was entitled to absolute immunity, it was not on the basis of the testimonial immunity recognized in *Briscoe*. Thus, the Court did not decide anything about the scope of testimonial immunity. In fact, the Court in *Malley* did not even discuss the rule of testimonial immunity under *Briscoe*.[8]

Second, from a functional standpoint, Paulk's testimony to the grand jury is much more analogous to the trial testimony in *Briscoe* than it is to the affidavit testimony in *Malley*. The Court recognized this in *Malley* when it rejected the police officer's attempt to analogize his conduct to a prosecutor's conduct for which absolute immunity is available under *Imbler*. The Court observed that the act of applying for an arrest warrant, "while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.* at 342-43.

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[8] *Malley's* only reference to *Briscoe* is a citation for the proposition that the purpose of absolute immunity is not to protect wrongdoers but rather to protect the judicial process. *Malley*, 475 U.S. at 342. Any number of other cases could have been cited in support of that proposition. *See, e.g.*, *Imbler*, 424 U.S. at 424-28.

Paulk's testimony before the grand jury was the first step in the district attorney's prosecution of Rehberg, GA. CODE ANN. § 16-1-3(14) (providing that a prosecution commences with the return of the indictment), and as such, it was "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, and deserving of absolute immunity.

Although there are obvious differences between grand jury proceedings and trials, the similarities are much greater. Witnesses in each are subject to compulsory process, must testify under oath, must answer questions asked by the prosecutor, and are subject to prosecution for perjury. It is true, of course, that a grand jury witness is not subject to adversarial cross-examination, but this difference is ameliorated by the prosecutor's ethical obligation "to seek justice, not merely to convict." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, PROSECUTION FUNCTION STANDARD 3-1.2(c) (3d. ed. 1993). "Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a 'minister of justice' or as occupying a quasi-judicial position." *Id.* cmt. Georgia's Rules of Professional Conduct impose a similar ethical duty on prosecutors: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." GA. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1. Thus, the absence of adversarial cross-examination in grand jury proceedings is not nearly as significant as it is in an ex parte hearing for an arrest warrant.

Further, Georgia law permits grand jurors to ask questions of the witnesses, in effect cross-examining them. GA. CODE ANN. § 15-12-67(a) (authorizing the foreperson to examine witnesses); *Davis v. State*, 33 S.E.2d 728, 729 (Ga. Ct. App. 1945) (suggesting that all grand jurors may examine witnesses). And there is nothing to prevent the grand jurors from requesting that the prosecutor present additional witnesses or evidence or from refusing to indict if the prosecutor's evidence is insufficient. Indeed, a grand jury is not an arm of the prosecutor that merely rubber stamps what the prosecutor wants. Rather, "[t]he grand jury . . . acts as a vital check against the wrongful exercise of power by the State and its prosecutors." *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (internal quotation marks omitted). That being said, unlike an ex parte hearing for an arrest warrant, a grand jury proceeding and a criminal trial are both part of the "prosecution," which Georgia law defines as "all legal proceedings by which a person's liability for a crime is determined, commencing with the return of the indictment or the filing of the accusation, and including the final disposition of the case upon appeal." GA. CODE ANN. § 16-1-3(14). In Georgia, only the state –

through the district attorney – may conduct grand jury proceedings and further prosecute crimes. GA. CODE ANN. § 15-18-6(2) and (4).[9] In contrast, submitting an affidavit in support of an arrest warrant may be done by anyone, including private persons, and may be done on an ex parte basis without a hearing before a judge. GA. CODE ANN. § 17-4-40.

Finally, Paulk was not a complaining witness when he testified before the grand jury, and he certainly has not characterized himself as one like the police officer in *Malley* did. 475 U.S. at 340.[10] Historically, the complaining witness was the victim of the alleged crime, and the tort of malicious prosecution applied only to "[a] *private* person who initiate[d] or procure[d] the institution of criminal proceedings against another." RESTATEMENT (SECOND) OF TORTS

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[9] There are some exceptions to this. For example, the Georgia Attorney General may prosecute certain crimes. GA. CODE ANN. § 45-15-10. Also, some counties in Georgia have a solicitor general who is responsible for prosecuting misdemeanor offenses. GA. CODE ANN. § 15-18-66. The point is that only government officials are authorized to prosecute crimes in Georgia; private prosecution by the victim or his family or friends is no longer permitted. GA. UNIF. SUPER. CT. R. 42.1.

[10] Because the police officer in *Malley* contended that he was a complaining witness, the Court did not decide whether a government official can be properly characterized as a complaining witness. Instead, it simply accepted the police officer's characterization of himself as a complaining witness and rejected his argument that complaining witnesses had absolute immunity from common-law claims for malicious prosecution in 1871. *Malley*, 475 U.S. at 340-41.

§ 653 & cmt. c (1977) (emphasis added); *see also* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 318 (1973) ("In modern American practice, where the public prosecutor has developed a monopoly over the instigation and conduct of criminal litigation, this citizen figure [i.e., the "aggrieved citizen" or victim] lives on as the complaining witness."). Because this tort applied only to private persons, "[i]t ha[d] no application to public officials charged with the enforcement of criminal law in the performance of their public duty." RESTATEMENT (SECOND) OF TORTS § 653 cmt. e.

The Court has recognized that the terms "complaining witness" and "accuser" are synonymous. *Sacher v. United States*, 343 U.S. 1, 11 (1952). More recently, Justice Scalia observed that a complaining witness is also known as a "private prosecutor[ ]" and "the private party bringing the suit." *Kalina v. Fletcher*, 522 U.S. 118, 133 (1997) (Scalia, J., concurring); *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* RESTATEMENT (SECOND) OF TORTS § 653 cmt. c ("Throughout this Chapter the term 'private prosecutor' is used to describe a private person who initiates criminal proceedings. Other terms such as 'prosecuting witness,' 'complaining witness,' 'complainant' or 'accuser' are in common use.").

Based on the history of public prosecution in England and pre-1871 America, it is not surprising that a complaining witness in 1871 was a private person who was the victim of a crime. Before 1871, the prevailing method of prosecuting crime was via private prosecution, whereby the victim or his family or friends would hire an attorney to prosecute the accused, or else the victim would do it himself. Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673-81 (2010) [hereinafter O'Neill, *Private Vengeance*]; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 421-23 (2009); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515-21 (1994); *see also Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (noting that "there generally was no such thing as the modern public prosecutor" in 1871). Although most states had developed some form of public prosecutor by 1820, "privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995); *see also* O'Neill, *Private Vengeance*, at 674 ("Until the late nineteenth century, however, private prosecutions dominated the legal landscape.").

Under this system of private prosecution, the complaining witness – i.e., the victim (or his family or friends) – was the person who initiated and pursued the prosecution of the accused. It stands to reason, therefore, that the complaining witness – not a public prosecutor – was the defendant in a common-law tort action for malicious prosecution. Indeed, all of the

19th-century cases upon which Rehberg relies for establishing the state of the common law in 1871 were brought against private persons.[11] Because today's system of public prosecution, including the use of investigators to assist those prosecutors, was largely unknown in 1871, Congress could not have intended to abrogate an immunity for a government official that did not exist, not because the common law had rejected it, but because the underlying claim itself did not exist. Thus, there is no "relevant official" whose immunity in 1871 can be used to determine whether a 21st-century employee of a public prosecutor is entitled to absolute immunity for testifying falsely to a grand jury. *Imbler*, 424 U.S. at 421 (noting that immunity decisions are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it").

Although the absence of a historical comparator has on one occasion led the Court to deny immunity for a government official, *Tower v. Glover*, 467 U.S. 914, 921 (1984) (holding that public defenders are not entitled to immunity because "there was . . . no such office or position in existence" in 1871, which obviously meant that there was no common-law immunity for them in 1871), the Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Indeed, the Court has on many occasions conferred immunity under Section 1983 where none existed in the 1871 common law.

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[11] This system of private prosecution embodies the concept of a victim "pressing charges." Under this system, a victim would "press charges" by initiating a prosecution against the alleged perpetrator. If the victim declined to "press charges," there would be no prosecution. Today, however, the concept of "pressing charges" is obsolete, at least in those jurisdictions where private prosecution is not permitted, because victims cannot dictate whether a public prosecutor will prosecute. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that a citizen lacks standing to challenge a prosecutor's decision because he "lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

For example, public prosecutors have absolute immunity from liability under Section 1983, at least insofar as they act as an advocate, even though the first case to recognize common-law immunity for public prosecutors was not decided until 25 years after Congress enacted Section 1983. *Imbler*, 424 U.S. at 421; *see also Burns*, 500 U.S. at 499 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "the first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of § 1983"); *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983) ("Indeed, in *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted."). Despite the lack of 19th-century common-law support for its decision, the Court relied on 20th-century cases and policy considerations to justify its recognition of prosecutorial immunity. *Imbler*, 424 U.S. at 422-28.

Another example is judicial immunity. Although the Court has declared that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967), its assessment of the historical evidence has been questioned. Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 758-60 (1987) [hereinafter Matasar, *Personal Immunities*]. Aside from the question of whether judicial immunity is well grounded in history, the Court has greatly expanded the scope of that immunity from its common-law origins.

In 1868, the Court held that judges "are not liable to a civil action for any judicial act done within their jurisdiction," but that judges may be liable for acts done maliciously or corruptly in excess of their jurisdiction. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535-36 (1868). Three years later, the Court retreated from the rule announced in *Randall* and held that judges are immune unless they act with "the clear absence of all jurisdiction." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). But just eight years after deciding *Bradley*, the Court held that a judge was not immune for excluding black citizens from jury duty because he had acted "outside of his authority." *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 348 (1879). No mention of *Bradley* was made. Currently, the Court adheres to the view expressed in *Bradley* that a judge "will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351).

In *Stump*, the Court acknowledged its earlier holding in *Randall* but dismissed the precedential value of that case because it had decided in *Bradley* that the rule announced in *Randall* was not correct. *Id.* at 355 n.5. The point here is not to criticize the Court's rule regarding judicial immunity or to argue that the rule should be based on *Randall* or *Bradley*. Rather, the point is that the Court had expressed its view of the common-law immunity accorded to judges in *Randall*, which was before Congress enacted Section 1983, but then relied on *Bradley*, which was decided *after* Congress enacted Section 1983, as its common-law support for the absolute immunity to which judges are entitled in lawsuits brought under Section 1983. Because "[a]cts in 'excess' of jurisdiction encompass a wide variety of things that are not in 'clear absence of jurisdiction,'" judicial immunity under the *Stump/Bradley* rule is greatly expanded from what it was under the *Randall* rule. Matasar, *Personal Immunities*, at 759.

The Court's qualified immunity jurisprudence also represents a departure from its prescribed methodology for resolving immunity questions. At common law, executive officials had good-faith immunity for "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances." *Wood v. Strickland*, 420 U.S. 308, 321 (1975). The Court held that this qualified immunity consists of both objective and subjective components. *Id.* at 321-22. Because the subjective component proved to be incompatible with the goal of not allowing insubstantial claims to proceed to trial, the Court quickly determined that "an adjustment of the 'good faith' standard" was necessary. *Harlow v. Fitzgerald*, 457 U.S. 800, 814-16 (1982). The adjusted standard for qualified immunity eliminated the subjective component entirely: "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. As the Court later recognized, its decision in *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645; *see also Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (noting that "our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume"); *Burns*, 500 U.S. at 498 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that *Harlow* and *Anderson* "extended qualified immunity beyond its scope at common law").

The Court has also conferred absolute immunity on certain officials performing functions that did not exist before 1871. In *Butz v. Economou*, 438 U.S. 478, 508-14 (1978), the Court held that hearing examiners and administrative law judges are entitled to absolute immunity. And in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402-06 (1979), the Court held that regional legislators are entitled to absolute immunity. As all of these cases show, the absence of a parallel immunity recognized by the common law in 1871 does not preclude the Court from conferring absolute immunity under appropriate circumstances. This case presents such an appropriate circumstance.

Paulk's position is that this case is controlled by *Briscoe* and that the Court need only do what most of the circuit courts already have done – hold that absolute immunity applies to all government officials who testify at any judicial proceeding, including grand jury proceedings. *Malley* is not inconsistent with this rule because it involved a police officer who presented an affidavit in a non-judicial proceeding, which was not "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430.

If the Court finds that *Briscoe* does not answer the question presented in Paulk's favor, this case is one in which the Court should find that the government official is entitled to absolute immunity despite the absence of a precise common-law analog. In addition to the policy considerations supporting absolute immunity for government officials who testify in grand jury proceedings, which are discussed in Part

II below, it would be anomalous for a prosecutor to have absolute immunity for directing his investigator to offer testimony at a grand jury proceeding that he (the prosecutor) knows to be false, while according the investigator only qualified immunity for offering the testimony. This is especially true here, where the testifying witness is the prosecutor's subordinate employee. Under this scenario, "the star player is exonerated, but the supporting actor is not." *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring). Here, the star players are Hodges and Burke, the district attorney and the specially appointed district attorney, and Paulk is the supporting actor, the investigator hired by and accountable to the district attorney. "It makes little sense to hold that a Government agent is liable for [giving false testimony before a grand jury], but that an official of higher rank who actually orders such [testimony] is immune simply because of his greater authority." *Butz*, 438 U.S. at 505-06. Yet this is exactly what Rehberg is asking the Court to do.

II. POLICY CONSIDERATIONS SUPPORT CONFERRING ABSOLUTE IMMUNITY ON GOVERNMENT OFFICIALS FOR THEIR GRAND JURY TESTIMONY

Although the historical analysis above is sufficient for the Court to rule in Paulk's favor, there are also compelling policy reasons for the Court to hold that absolute immunity applies to all government officials who testify at any judicial proceeding, including grand jury proceedings.

As Justice O'Connor once observed, examining the common law as it existed in 1871 to determine what Congress intended when it enacted Section 1983 "makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating." *Smith*, 461 U.S. at 93 (O'Connor, J., dissenting). But "[o]nce it is established that the common law of 1871 provides us with no real guidance on th[e] question, [the Court] should turn to the policies underlying § 1983 to determine which rule best accords with those policies." *Id.*; *cf. Virginia v. Moore*, 553 U.S. 164, 171 (2008) ("In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve. . . . When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness. . . .").

Here, a finding of absolute immunity for Paulk would be consistent with the historical analysis above, but it is true that the common law as it existed in 1871 did not confer absolute immunity on investigators employed by public prosecutors for their grand jury testimony. As explained above, the reason for this is simple: The system of public prosecution, including the use of investigators hired by and accountable to the prosecutor, that is so common today was largely unknown in 1871. Thus, as Justice O'Connor recognized in *Smith*, and as the Court has done on several occasions when resolving questions of immunity applicable to Section 1983 claims, the Court should turn to the policy considerations that bear on whether absolute immunity should apply to grand jury testimony.

The starting point, once again, is *Briscoe*. There, the Court recognized several policy considerations that warranted absolute immunity for trial testimony. First, the Court was concerned about self-censorhip by witnesses. 460 U.S. at 333. If a witness faced the possibility of damages liability for his trial testimony, he might be reluctant to come forward and testify in the first place, and even if he did testify, his fear of subsequent liability might cause him to distort his testimony. *Id.* As the Court explained, "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Id.*

Second, the Court worried that subjecting government officials to damages liability for their trial testimony would impair their ability to perform their jobs effectively. *Id.* at 343. Because government officials testify in numerous trials every year, the Court was concerned that "defendants often will transform resentment at being convicted into allegations of perjury by the state's official witnesses." *Id.* Without absolute immunity, government officials would have to devote substantial time and resources to defending themselves when their attention would be better directed at performing their official functions. *Id.* at 343-44. Although some claims would be dismissed before trial, the time and resources required would still be "considerable." *Id.* at 343. Many claims, however, would not be susceptible to pretrial adjudication because they would require a factual determination as to whether the government official testified falsely, and "a case that goes to trial always imposes significant emotional and other costs on every party litigant." *Id.* at 343 n.29, 344.

Finally, the Court noted that an unfortunate byproduct of a legal system operated by and involving humans is the possibility of unjust convictions based on false trial testimony. *Id.* at 345. While nobody wants criminal defendants to be unjustly convicted, "the alternative of limiting the official's immunity would disserve the broader public interest." *Id.* The Court's Section 1983 immunity jurisprudence reflects the value judgment that "'it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" *Id.* (quoting *Gregoire*, 177 F.2d at 581). Obviously, this is no consolation for the unjustly convicted person, but when conferring absolute immunity on various government officials the Court has looked beyond the specific individual interests involved to the broader societal interests in the integrity of the judicial process. As the Court observed in *Malley*, the goal of absolute immunity is not to protect government officials who abuse the authority of their office but rather to protect the integrity of the judicial process. 475 U.S. at 342.

All of the policy considerations recognized in *Briscoe* weigh heavily in favor of conferring absolute immunity for grand jury testimony, irrespective of whether the witness is a complaining witness. First, the danger of self-censorhip by grand jury witnesses is no less than it is by trial witnesses, and the importance of candid, objective, and undistorted testimony is no less in a grand jury proceeding than it is in a trial. Second, just as criminal defendants will transform their resentment at being convicted into allegations of perjury by a trial witness, so too will people who are disgruntled at being indicted. There is no reason to believe that grand jury witnesses will be sued less frequently than trial witnesses if they are not entitled to absolute immunity for their testimony. As with the Court's concern in *Briscoe* about the energy and attention of police officers being "diverted from the pressing duty of enforcing the criminal law," 460 U.S. at 344 (internal quotation marks omitted), the energy and attention of investigators employed by public prosecutors would also be diverted from their equally important role in investigating and assisting in the prosecution of crime. Finally, the purpose of absolute immunity for grand jury testimony is the same as it is for trial testimony. It is necessary, not because public policy ought to protect people who lie to a grand jury, but rather because public policy accepts the risk of some wrongful indictments in exchange for protecting the integrity of the judicial process.

These policy considerations are equally applicable to both complaining witnesses and other witnesses. As a result, there is no reason to distinguish – for purposes of immunity – between grand jury testimony and trial testimony, or between complaining witnesses and other witnesses. Indeed, *Briscoe* applies broadly to all trial witnesses and makes no distinction between the testimony of complaining witnesses and the testimony of other witnesses, and Rehberg does not argue that a complaining witness who testifies at trial should not have absolute immunity. Presumably, a witness who testifies at trial cannot be a complaining witness because the prosecution has already been initiated and is nearing its conclusion. This means that a witness who offers identical testimony in a grand jury proceeding and at trial would have qualified immunity for the former but absolute immunity for the latter. This defies common sense because there is no logical reason to immunize testimony in one judicial proceeding but not the other, especially since "false testimony before the grand jury is less harmful than false testimony at trial; the grand jury can indict, but cannot convict." *Kincaid*, 712 F.2d at 1024 (explaining that this is why "the argument for absolute immunity is stronger in the grand jury setting than in the trial setting").

In addition, there are numerous problems with having an exception to absolute testimonial immunity for complaining witnesses, assuming that a government official like Paulk can even be a complaining witness. Most importantly, how is a trial court to determine whether a witness is a complaining witness? As several circuit courts have held, this determination requires a factual inquiry into the witness's role in initiating the prosecution, which may not be susceptible of resolution on summary judgment. *See, e.g.*, *Enlow v. Tishomingo County*, 962 F.2d 501, 511-12 (5th Cir. 1992); *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988). In *Briscoe*, the Court recognized this in the context of the significant burdens that litigation involving witness testimony could impose on the judicial system and law-enforcement resources:

> Moreover, lawsuits alleging perjury on the stand in violation of the defendant's due process rights often raise material questions of fact, inappropriate for disposition at the summary judgment stage. The plaintiff's complaint puts in issue the falsity and materiality of the allegedly perjured statements, and the defendant witness's knowledge and state of mind at the time he testified. Sometimes collateral estoppel principles will permit dismissal at the pretrial stage. But if the truth of the allegedly perjured statement was not necessarily decided in the previous

> criminal verdict, if there is newly-discovered evidence of falsity, or if the defendant concedes that the testimony was inaccurate, the central issue will be the defendant's state of mind. Summary judgment is usually not feasible under these circumstances. If summary judgment is denied, the case must proceed to trial and must traverse much of the same ground as the original criminal trial.

460 U.S. at 343 n.29 (citation omitted).

If the issue cannot be determined before trial, the overarching purpose of immunity – to allow government officials to avoid the burdens and expenses associated with discovery and trial – will be defeated. In the context of qualified immunity for executive officials, the Court recognized in *Harlow* that too many cases were proceeding to trial because of the then-existing subjective element of the defense, and so it altered the defense to better uphold this purpose. 457 U.S. at 815-17. The Court explained, "Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Id.* at 817.

Like the judicial inquiry required to determine subjective motivation for qualified immunity, the judicial inquiry required to determine whether a witness is a complaining witness is equally burdensome. The issue may be relatively easy where there is only one witness who testifies before the grand jury, but not so when there are multiple witnesses. The question is whether a witness sufficiently initiated the prosecution, and this itself is a subjective determination. If five witnesses testify, is only the first witness the complaining witness? If the grand jury would not have returned an indictment based only on the first witness's testimony, but would have returned an indictment based on the first and second witnesses' combined testimony, are only the first and second witnesses the complaining witnesses? If a scheduling conflict prevents the witnesses from testifying in the order intended by the prosecutor such that the first and second witnesses testify fourth and fifth, are they still the complaining witnesses? The first and second witnesses could be the complaining witnesses if they actually testified first and second but not if they testified fourth and fifth because the testimony of the witnesses who actually testified first and second was sufficient for the grand jury to return an indictment. Does it matter if a witness testified pursuant to a subpoena?[13] The end result is that a witness could be a complaining witness under some circumstances but not under others, even though his testimony would have been identical under either set of circumstances. Whether a witness is entitled to absolute immunity should not depend on such vagaries.

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[13] "Absent a claim of the privilege, the duty to give testimony [before a grand jury] remains absolute." *Mandujano*, 425 U.S. at 575. Thus, a complaining witness could be faced with the choice of subjecting himself to contempt of court or potential civil damages liability. This is not a fanciful hypothetical. The Court itself has recognized that "honest witnesses might erroneously be subjected to liability because they would have difficulty proving the truth of their statements." *Briscoe*, 460 U.S. at 333 n.13.

Under Rehberg's theory, complaining witnesses are those witnesses whose testimony is sufficient to result in an indictment. But it is extremely difficult, if not impossible, to say how much is "sufficient." What is enough for one grand juror may not be enough for another. Thus, determining whether a witness is the complaining witness will not only require a factual inquiry into the witness's role in initiating the prosecution, but it will also require discovery relating to the grand jury proceeding. All of the grand jurors will have to be deposed to determine which combination of testimony was sufficient for them to vote to indict, and the prosecutor and other witnesses who testified before the grand jury also may have to be deposed. *Jones v. Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999). Such discovery would impair the secrecy of the grand jury proceeding, which is considered essential to the proper functioning of the grand jury. *Douglas Oil Co. of Cal. v. Petrol Stops N.W.*, 441 U.S. 211, 218-23 (1979); *see also* FED. R. CRIM. P. 6(e); GA. CODE ANN. § 15-12-67. As the Eleventh Circuit recognized below, this concern is not implicated in the scenarios at issue in *Malley* and *Kalina*. *Rehberg*, 611 F.3d at 840 n.8. In the end, discovery on this issue would eviscerate both the reason for secrecy in grand jury proceedings and the reason for immunity. *Jones*, 174 F.3d at 1287 n.10.

Having absolute immunity for grand jury testimony is not a license for witnesses – complaining or otherwise – to lie with impunity to the grand jury. Witnesses testifying before both federal and Georgia grand juries may be prosecuted for perjury. Federal law provides that a person found guilty of perjury before a grand jury shall be fined and/or imprisoned for up to five years. 18 U.S.C. § 1623(a). Georgia law is even more punitive, providing that the penalty for perjury shall be a fine of up to $1,000 and/or imprisonment for at least one, but not more than, ten years. GA. CODE ANN. § 16-10-70(b).[13] If the witness's false testimony caused another person to be imprisoned, Georgia law requires the convicted witness to be imprisoned for an amount of time not to exceed the sentence received by the wrongfully convicted person. *Id.* And if the witness's false testimony caused another person to be executed, Georgia law requires the perjuror to be imprisoned for life. *Id.* In addition to being prosecuted for perjury, a government official who willfully deprives a person of his federal constitutional or statutory rights may be punished criminally under federal law. 18 U.S.C. § 242. Thus, the deterrent effect of being prosecuted for perjury or for civil rights violations is significant and cannot be discounted.

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[13] The scope of the federal and Georgia statutes on perjury also support the application of absolute witness immunity to grand jury testimony. Federal law includes a statute that covers perjury generally. 18 U.S.C. § 1621. It also includes a statute that covers perjury "in any proceeding before or ancillary to any court or grand jury of the United States." 18 U.S.C. § 1623(a). Similarly, Georgia has a statute that covers false swearing generally. GA. CODE ANN. § 16-10-71. It also has a statute that covers perjury in the specific context of "judicial proceedings." GA. CODE ANN. § 16-10-70(a). The fact that federal and Georgia law treat perjury in court and perjury in grand jury proceedings differently from perjury in other contexts indicates that the same immunity that applies to witnesses who testify in trials should apply to witnesses who testify in grand jury proceedings. Moreover, Georgia law imposes stiffer penalties for perjury in judicial proceedings, which include grand jury proceedings, than for perjury in other contexts. *Compare* GA. CODE ANN. § 16-10-70(b) (penalties for perjury in judicial proceedings), *with* GA. CODE ANN. § 16-10-71(b) (penalties for false swearing in all other contexts). Because Georgia law treats perjury at trial the same as perjury at a grand jury proceeding from the standpoint of punishment, it is logical for the immunities that apply to trial testimony and grand jury testimony to be the same.

Deterrence of false testimony is, of course, the goal. Society does not want a system where government officials testify falsely in judicial proceedings and then take their chances in Section 1983 cases. Instead, we want a system where government officials testify truthfully without fear of being sued for civil damages by disgruntled criminal defendants. Unfortunately, government officials are human and sometimes come up short of this aspiration. The question, then, is how to deter them from testifying falsely and to encourage them to take greater care in ensuring that their testimony is accurate in the face of the reality that they may be called upon to testify to facts provided to them by others. The answer is not to subject them to civil damages liability. *Jones*, 174 F.3d at 1287 n.10 ("The remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages."). Indeed, Professor Lawrence Rosenthal argues that the threat of civil damages liability is unlikely to alter prosecutorial behavior because the political and professional incentives for prosecutors to prosecute crime aggressively far outweigh the political incentives to minimize civil damages liability, especially since government officials are likely to be indemnified by their employers. Rosenthal, *Second Thoughts*, at 152-61. As Professor Rosenthal explains,

> Given their political and professional incentives, we cannot expect prosecutors to be attentive to potential civil liability; for that reason, it may be best to leave deterrence of prosecutorial misconduct to the professional embarrassment associated with exonerations, and the potential for professional discipline in the most serious cases. As for investigators, the threat of liability in the most egregious cases may create some additional political incentive to devote scarce public resources to monitoring and discipline, and when it comes to egregious abuses, it is unlikely that the deterrent effect of liability will be offset by the political advantage of pursuing abusive techniques of which the public is likely to approve. Short of these outliers, however, it is extremely doubtful that the threat of civil liability is likely to reduce the incidence of wrongful conviction.

Id. at 160-61 (footnotes omitted).

Subjecting a complaining witness to civil damages liability in a common-law action for malicious prosecution made sense under the pre-1871 system of private prosecution because allowing a victim to prosecute the accused created an incentive for vindictiveness in the victim. For the same reason today, it makes sense for a private person who instigates a prosecution not to have immunity. But it makes no sense to deprive a government official who neither instigates the prosecution (in the sense that the victim does) nor initiates the prosecution (in the sense that the public prosecutor does) of absolute immunity for testifying before a grand jury. This is especially so in light of the facts that (1) the prospect of civil damages liability does not deter government officials from testifying falsely, and (2) there are other constitutional, legal, political, professional, and personal deterrents and safeguards in place to diminish the incentive for giving false testimony.

Once again, it bears emphasizing that the common-law concept of the complaining witness does not apply to government officials because the system of public prosecution that is so prevalent today was largely unknown before 1871. Under the former system of private prosecution, government officials did not initiate prosecutions. Although certain government officials today do initiate prosecutions, investigators like Paulk do not. When Paulk testified to the grand jury about Rehberg, he was merely presenting evidence; the complaining witnesses were Hotz, Phoebe Putney Memorial Hospital, and/or whoever received and complained about the allegedly harassing faxes sent by Rehberg.[14] Moreover, Paulk was not legally authorized to initiate the prosecution of Rehberg under Georgia law. Only the district attorney was authorized to do that.

In the end, the policy considerations outlined above demonstrate that absolute immunity should apply to all grand jury testimony. Under Rehberg's proposed approach, every case would require a factual determination as to (1) whether a witness is a complaining witness, thereby forcing an untold number of government officials to endure the burdens and expenses of litigation; and (2) whether the witness testified falsely. Such a formulation would render the purposes of immunity (even qualified immunity) meaningless. The inability to make this determination without discovery (or a possible trial) indicates that this is an issue that calls for the clarity and predictability of a bright-line rule. Thus, the Court should hold that absolute immunity applies to all government officials who testify at any judicial proceeding, including grand jury proceedings. Under this rule,

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[14] As noted above, federal law and Georgia law allow grand juries to consider hearsay and other evidence that would be inadmissible at trial. Because it is permissible to present hearsay and otherwise inadmissible evidence to a grand jury, the prosecutor's presentation about Rehberg to the grand jury was streamlined by having Paulk testify in summary fashion on the basis of information provided by others. Under Rehberg's theory, Paulk became the complaining witness simply because the prosecutor attempted to be efficient.

Paulk is entitled to dismissal of Rehberg's claim for malicious prosecution.

◆

CONCLUSION

For the foregoing reasons, the Court should hold that all government officials who testify at any judicial proceeding, including grand jury proceedings, are entitled to absolute immunity. Under this rule, Paulk has absolute immunity from civil liability under Section 1983 for any claims arising out of his testimony to the grand jury. Accordingly, the Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

JOHN C. JONES
Counsel of Record
248 Roswell Street
Marietta, GA 30060
(770) 427-8066
jcjones1234@bellsouth.net

THEODORE FREEMAN
SUN S. CHOY
JACOB E. DALY
FREEMAN MATHIS &
GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339
(770) 818-0000

Counsel for Respondent
James P. Paulk

REPLY BRIEF

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CHARLES A. REHBERG,
Petitioner,
v.
JAMES P. PAULK, KENNETH B. HODGES, III,
AND KELLY R. BURKE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street
Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR PETITIONER

The immunity question in this case begins and ends with the common-law principle that applied at the time Section 1983 was enacted—complaining witnesses could be held liable in damages on the basis of their grand jury testimony. Neither respondent nor his *amici* cite a single case applying a contrary rule. Rather, the nineteenth-century cases cited by the Solicitor General confirm that complaining witnesses could be subject to liability for grand jury testimony.

No doubt recognizing the absence of any support for their position under the historical test consistently applied by this Court, respondent and his supporters focus their attention elsewhere.

First, they attack the concept of a "complaining witness," contending that it is vague and does not apply to modern prosecutions in which law enforcement officers provide the facts that trigger criminal prosecutions. But this Court has twice labeled as "complaining witnesses" law enforcement officials who allegedly furnished false information leading to the arrest of innocent citizens. See *Malley* v. *Briggs*, 475 U.S. 335 (1986) (no absolute immunity for "complaining witness" police officer); *Kalina* v. *Fletcher*, 522 U.S. 118 (1997) (no absolute immunity for "complaining witness" prosecutor). And the concept, which is deeply rooted in history, continues to be applied at common law today. Only by overruling *Malley* and *Kalina*, and ignoring contemporary common law, could the Court decline to apply a complaining witness rule to public law enforcement officers like respondent in this case.

Second, respondent and his *amici* urge the Court to adopt a new absolute immunity standard unrelated to historical common-law principles. Treating this Court's opinion in *Briscoe* as the equivalent of a statute conferring immunity, they combine an out-of-context snippet from that opinion with policy arguments that this Court rejected in *Malley* and *Kalina* to create a novel "judicial proceedings" standard.

The Court should reject this invitation to engage in judicial law-making. The historical test controls. Moreover, respondent's "judicial proceedings" test makes no sense and, if anything, points toward the conclusion that grand jury proceedings are *not* judicial proceedings.

Finally, neither respondent nor the government has an answer to our argument that absolute immunity for maliciously false grand jury testimony would create a bizarre anomaly. It would immunize law enforcement officers for lying to a grand jury even though they could be held liable for falsely presenting the very same facts directly to a judge by sworn affidavit. The Court should reject that unjustifiable result and hold that a complaining witness's grand jury testimony, like a complaining witness's written submission to a judge, is protected by qualified immunity.

A. At Common Law, Complaining Witnesses Were Subject To Liability For Their Grand Jury Testimony.

The threshold and dispositive issue in this case is whether respondent would have been absolutely immune for his grand jury testimony under the common law in 1871. Pet. Br. 12-17; *Malley* v. *Briggs*, 475 U.S. 335, 339-340 (1986) ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts."); see also *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 281 (1993) (Scalia, J., concurring) ("[T]he Court reaffirms that the defendant official bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871" and "if application of the principle is unclear, the defendant simply loses").

American courts in the 1860s and 1870s routinely entertained malicious prosecution suits against complaining witnesses who testified falsely before grand juries. Pet. Br. 15-16 (citing cases); see also *Anderson* v. *Callaway*, 7 Del. 324, 325-326 (Del. Super. Ct. 1861) (malicious prosecution upheld where defendant "was the only name endorsed on the indictment as a witness" against the plaintiff); *Moulton* v. *Beecher*, 1 Abb. N. Cas. 193, 194 (N.Y. Gen. Term. 1876) (malicious prosecution action upheld involving complaint alleging in part that "defendant did * * * voluntarily go before the grand jury * * * for the purpose of procuring an indictment against plaintiff"), aff'd, 53 How. Pr. 86 (N.Y. Gen. Term. 1877). These holdings are consistent with Blackstone's observation that a person was liable for "preferring malicious indictments," and that "an action on the case for a malicious prosecution may be *founded upon an indictment* whereon no acquittal can be had, as if it be rejected by the grand jury [or] insufficiently drawn." 3 William Blackstone, *Commentaries* *126-127 (emphasis added).

We have not located a single case in which a nineteenth-century court held that liability could not be premised in whole or in part on maliciously false grand jury testimony. Respondent and his *amici* do no better.[1]

This history alone is fatal to respondent's claim for absolute immunity. Although respondent and his *amici* work mightily to explain away this fundamental historical fact, their efforts are unavailing.

1. Respondent contends that the "complaining witness" role is an historical artifact from the days of "private prosecutions" and not applicable to witnesses who are publicly employed law enforcement officers. Resp. Br. 11-12, 23-27; see Brief for the Int'l Mun. Lawyers Ass'n *et al.*, at 17-20.

But this argument ignores the Court's instruction that "[i]n determining whether particular actions of government officials fit within a common-law tradition of absolute immunity," the Court looks to "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (1993) (internal quotation marks omitted). Indeed, both *Malley* and *Kalina* applied the complaining witness rule to public law enforcement officials who allegedly furnished maliciously false information leading to the arrest of innocent citizens.

In any event, respondent's history is wrong. Public prosecutors were active throughout the United States by 1871, with complaining witnesses functioning solely as "witnesses" rather than "prosecutors."[2]

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[1] Indeed, the cases that the government introduces actually support the opposite proposition. See pages 8-9, *infra*.

[2] Respondent attempts to exploit scholarly debate over precisely when public prosecutors came to predominate over private prosecution in American criminal law. Some scholars have asserted that American colonists abandoned the English common-

As early as 1820, most states had developed a local public prosecutor, often known as a county attorney or district attorney. See Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 43 (1995). By 1871, the constitutions of more than three-quarters of the states provided for local public prosecutors,[3] and local public prosecution was

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law practice of private prosecution and that public prosecutors had become so "deeply engrained" during the colonial era that "public prosecution was firmly established as the American system by * * * 1789" (when the Judiciary Act created "United States district attorneys to prosecute federal crimes"). Jack M. Kress, *Progress and Prosecution*, 423 Annals Am. Acad. Pol. & Soc. Sci. 99, 103 (1976). Others point to the second half of the nineteenth century as the period when public prosecutors took over most criminal prosecutions. See Yue Ma, *Exploring the Origins of Public Prosecution*, 18 Int'l Crim. Just. Rev. 190 (2008). Whichever view is correct about when public prosecutions became predominant, there is no doubt that public prosecutors were widespread by 1871, with complaining witnesses that assisted the public prosecutors liable for damages in malicious prosecution actions.

[3] In 1871, twenty-eight of the then-thirty-seven States provided for local public attorneys in their constitutions. Twenty-three state constitutions provided for their direct election. See Ala. Const. of 1867, Art. VI, § 17; Cal. Const. of 1849, Art. VI, § 7 (1862); Ill. Const. of 1870, Art. VI, § 22; Ind. Const. of 1851, Art. VII, § 11 (amended in 1952); Iowa Const. of 1857, Art. V, § 13; Ky. Const. of 1850, Art. VI, § 1; La. Const. of 1868, Art. 92; Md. Const. of 1867, Art. V, § 7; Mass. Const. of 1780, Art. of Amend. XIX (1856); Mich. Const. of 1850, Art. X, § 3; Minn. Const. of 1857, Sched., § 15; Miss. Const. of 1868, Art. VI, § 25; Nev. Const. of 1864, Art. IV, § 32; N.Y. Const. of 1846, Art. X, § 1; N.C. Const. of 1868, Art. IV, § 29; Or. Const. of 1857, Art. VII, § 17; S.C. Const. of 1868, Art. IV, § 29; Tenn. Const. of 1870, Art. VI, § 5; Tex. Const. of 1868, Art. V, § 12; Vt. Const., Amend. XVI (1850); Va. Const. of 1870, Art. VII, § 1; W. Va. Const. of 1863, Art. VII, § 5; Wisc. Const. of 1848, Art. VI, § 4. Five more States provided in their constitutions for local public attorneys.

common everywhere but in Rhode Island and Delaware, which utilized the same statewide attorneys general that they retain today.[4] Public prosecutors in every state commonly prosecuted cases on behalf of citizens, with complaining witnesses serving the same function as today: providing factual information to public prosecutors and/or grand juries making charging decisions.

See Ark. Const. of 1868, Art. XV, § 6; Fla. Const. of 1868, Art. VII, § 19; Ga. Const. of 1868, Art. V, § 4.1; Me. Const. of 1820, Art. IX, § 2; N.J. Const. of 1844, Art. VII, § 2.4. These constitutional provisions can be found in Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (1878).

[4] Of the nine states that did not constitutionalize local public prosecutors in 1871, seven had local public prosecutors. See 1867 Neb. Laws 854 (law providing for the "election of District Attorneys and defining their duties"); *State* v. *Main*, 31 Conn. 572, 573 (1863) (state's attorney); *Rice* v. *State*, 3 Kan. 141, 156 (1865) (district attorney); *State ex rel. Watson* v. *Farris*, 45 Mo. 183, 189 (1869) (circuit attorney); *Town of Troy* v. *Cheshire R.R. Co.*, 23 N.H. 83, 94 (1851) (public prosecutor); *Ohio R.R. Co.* v. *State*, 10 Ohio 360, 361 (1841) (prosecuting attorney); *In re Election Cases*, 65 Pa. 20, 20 (1870) (district attorney). Only Rhode Island and Delaware—the smallest of the United States—had public prosecutions, then and now, organized under an Attorney General, rather than local public prosecutors. See *State* v. *Ward*, 5 Del. 496, 496 (Del. Gen. Sess. 1854) (trial conducted by an attorney who "aided the Attorney General"); *State* v. *Pawtuxet Tpk. Co.*, 8 R.I. 521, 522 (1867) (prosecution conducted by attorney "for the Attorney General"). For modern data, see U.S. Dep't of Justice Bureau of Justice Statistics, *Prosecutors in State Courts, 2001*, at 11 (2002), *available at* http://www.bjs.gov/content/pub/pdf/psc01.pdf (reporting that only in Rhode Island, Delaware, and Alaska, which was not a state in 1871, is the Attorney General the chief prosecutor handling felony cases).

Critically, even after public prosecutors assumed control of the charging process, complaining witnesses could be sued for malicious prosecution when their statements set the wheels of government action in motion. See *Bacon* v. *Towne*, 58 Mass. 217, 235 (1849) (considering malicious prosecution claim against complaining witness in context of prosecution conducted by "public prosecutor"); *Stanton* v. *Hart*, 27 Mich. 539, 542 (1873) (finding that complaining witness could be liable for malicious prosecution and noting that "under our system all prosecutions are put under official control, and a principal reason for this was the abuses of private prosecutions, which are very apt to be set on foot for private purposes rather than for the public good"); *State* v. *Dillon*, 38 Tenn. 389, 391 (1858) (minor could be held liable for malicious prosecution and quoting 1801 statute providing that "[n]o State's Attorney shall prefer a bill of indictment to any grand jury in this State, without a prosecutor marked thereon."). There simply is no historical support for respondent's claim that complaining witness liability was confined to the era of private prosecutions.

2. The government seeks to deflect the force of the 1871 common-law rule by claiming, "[i]n most malicious prosecution actions, a plaintiff will be able to point to some act aside from courtroom testimony that allegedly 'procured' the arrest warrant," so that there may be no need to premise liability on a complaining witness's grand jury testimony. U.S. Br. 26. This argument is irrelevant.

The fact that a malicious prosecution action could sometimes be premised on acts outside the grand jury does not change the fact that the common law of 1871 permitted reliance on grand jury testimony to support—in whole or in part—a malicious prosecution action. That historical truth precludes absolute immunity under Section 1983.

A case invoked by the government—*Dennis* v. *Ryan*, 65 N.Y. 385 (1875)[5]—proves the point by holding that a complaining witness's appearance to testify falsely before a grand jury was evidence that supported a malicious prosecution claim: "In all that pertained to the criminal prosecution of the plaintiff, the defendant was as much the complainant and prosecutor as if he had, unbidden by legal process, *appeared before the grand jury and made the complaint upon which the indictment was found.*" *Id.* at 387 (emphasis added). Like the cases cited above, the complaining witness was held liable even though public prosecutors in New York controlled all prosecutions:

> [T]he district attorney, confiding in the truth of his statement, and, as in duty bound, caused him to be subpœnaed to appear before the grand jury and testify as to the matter of which he had complained; he appeared, testified, and the indictment followed. That he was the complainant was not questioned on th[illegible]. nor is it ra[illegible] the appellant here.

Ibid.

As the government recognizes, other nineteenth-century cases "'permitt[ed] a plaintiff to recover in an action for malicious prosecution based *in part* upon the defendant's appearance before the grand jury.'" U.S. Br. 26 (quoting *White* v. *Frank*, 855 F.2d 956, 960 (2d Cir. 1988), and citing *Dennis*, *supra*, and

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[5] The government mistakenly dates this case to 1865.

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Fitzjohn v. *Mackinder*. 142 Eng. Rep. 199 (Exch. Chamber 1861)). That concession eliminates any doubt about the historical basis for imposing liability based on a complaining witness's grand jury testimony.

In short, it is undisputed that the common law of 1871 did not preclude the imposition of liability on a complaining witness based on his or her grand jury testimony. That rule was not confined to private prosecutions, but also applied to public prosecutions. And the rule did not distinguish between claims premised entirely on grand jury testimony and claims based in part on activity occurring outside the grand jury. That common-law rule precludes adoption of a rule of absolute immunity for respondent's grand jury testimony.

B. The Court Should Not Replace Its Historical Common-Law Test With A New "Judicial Proceedings" Standard.

Unable to find support in the relevant history, respondent and the government devote much of their briefs to a new "judicial proceedings" immunity standard for Section 1983 actions. Resp. Br. 16-17; U.S. Br. 7-15. This novel standard cannot [illegible] squared with this Court's requirement that immunity be determined by reference to historical common-law equivalents, not present-day "judicial" or "non-judicial" labels. In any event, any sensible "judicial proceedings" test would not encompass grand jury investigative proceedings that do not involve the presence or activity of any judge.[6]

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[6] Respondent recognizes that a judge plays no part in the grand jury's proceedings. See Resp. Br. 10.

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1. Section 1983 "on its face admits of no immunities * * *." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). Each time this Court has found a Section 1983 defendant protected by absolute immunity, it has done so because there was a corresponding immunity "existing at common law." *Briscoe*, 460 U.S. at 334. Eschewing any law-making role, the Court has required a Section 1983 defendant seeking immunity to "point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-340.

Although the government (U.S. Br. 9) derives its novel "judicial proceedings" test from *Imbler*, it is telling that *Imbler*'s holding that prosecutors have absolute immunity was premised on the Court's lengthy review of the common law and its conclusion that prosecutors were historically immune for their advocacy role at common law. *Imbler*, 424 U.S. at 421-424. Only at the end of its opinion did the Court in *Imbler* state that a specific prosecutor's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430. A footnote to this sentence made clear that the Court's focus was on the prosecutor's role as "advocate," *id.* at 430 n.32, and the Court immediately cautioned that "[w]e have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator *or investigative officer* rather than that of advocate." *Id.* at 430-431 (emphasis added); see also *Kalina*, 522 U.S. at 129-130 (prosecutor not entitled to absolute immunity when acting as fact witness).

The Court in *Imbler* thus hewed to the standards at common law and quite clearly did not invent a new "judicial proceedings" test to govern the scope of immunity under Section 1983.[7]

2. The government also errs in relying on *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). First, like *Malley* and *Kalina*, *Briscoe* makes clear that the common law is the touchstone for determining the level of immunity. See *id.* at 330-331 (noting that "Congress likely intended these common-law principles to obtain" (quoting *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). And following this common-law approach, *Briscoe* concluded that the immunity of trial witnesses from "subsequent damages liability for their testimony in judicial proceedings was well established in English common law." *Id. Briscoe* took care to note that it was not ruling on the scope of immunity for "pretrial proceedings such as probable cause hearings." See *id.* at 328 n.5.

Briscoe also did not address grand jury proceedings. But, as we have previously explained (see page 10, *supra*), *Briscoe*'s common-law approach compels the conclusion that a complaining witness is not entitled to absolute immunity for his or her grand jury testimony.

3. The government does not define the term "judicial proceeding"—even though that is the centerpiece of its new standard for immunity determina-

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[7] The *Kalina* Court observed that *Imbler* relied on "policy considerations," noting that they were policies "underlying the firmly established common-law rules providing absolute immunity for judges and jurors." 522 U.S. at 124 n.11. Here, the "firmly-established common-law rules" permitted the imposition of liability on complaining witnesses—there is no need to rely on analogies to determine how persons in respondent's position would have been treated at common law.

tions under Section 1983. Common sense suggests that a "judicial proceeding" must at a minimum include the physical presence of a judge. But a judge is not present during grand jury proceedings.

By contrast, the false affidavits at issue in *Malley* and *Kalina* were submitted under oath directly to a judge.[8] Yet—given the Court's holdings in those cases—that judge-supervised process could not qualify as a "judicial proceeding." The government's mixed-up definition of a "judicial proceeding" thus includes proceedings where no judge is to be found (an investigative grand jury hearing) yet excludes proceedings where a judge is present, receives sworn evidence, and issues arrest warrants (*Malley* and *Kalina*). The government's standard simply makes no sense.

The government cites but one case to support its claim that an investigative grand jury hearing is a judicial proceeding. U.S. Br. 12-13 (citing *United States* v. *Mandujano*, 425 U.S. 564, 575-576 (1976) (noting that "federal statutes conferring immunity on witnesses in federal judicial proceedings, including grand jury investigations, are so familiar that they have become part of our constitutional fabric" (internal quotation marks omitted))). The Court's decision in *Mandujano* concerned *Miranda* rights for grand jury witnesses. It had nothing to do with Section 1983 or principles of immunity.

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[8] After the prosecutor submitted her certification regarding Kalina's actions, "the trial court found probable cause and ordered that an arrest warrant be issued." *Kalina*, 522 U.S. at 121. Similarly, in *Malley*, "[t]he judge signed warrants for the arrest of respondents and 20 other individuals charged by petitioner as a result of information gathered through the wiretap." *Malley* 475 U.S. at 338.

Moreover, for Sixth Amendment purposes, this Court has repeatedly held that "judicial proceedings" begin only *after* a grand jury returns an indictment, not while the grand jury is still investigating and hearing testimony of witnesses. See, *e.g.*, *Fellers* v. *United States*, 540 U.S. 519, 523 (2004) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated * * * whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (internal quotation marks omitted))).[9]

In short, the Court should reject the government's novel "judicial proceedings" test and adhere to its common-law approach for determining the scope of immunity under Section 1983. Even if this test were to govern, moreover, grand jury investigative hearings could not qualify as judicial proceedings.[10]

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[9] Adding to confusion about the meaning of a "judicial proceeding" is the fact that the term has a very different meaning when it is used in the Constitution's Full Faith and Credit Clause and a related federal statute—in that context it refers to a final judgment of a court. See U.S. Const. Art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); 28 U.S.C. § 1738; *Kremer* v. *Chem. Const. Corp.*, 456 U.S. 461, 466 & n.6 (1982).

[10] The Municipal Lawyers' *amicus* brief tries to distract the Court with questions on which it did not grant certiorari and that were not raised in any court below. First, acknowledging that petitioner has pleaded a Fourth Amendment claim that is based on conduct constituting malicious prosecution under the common law, it argues that "a claim for malicious prosecution

C. The Court Should Reject The Policy Arguments Advanced By Respondent And The Government.

Respondent and his *amici* attempt to bolster their "judicial proceedings" test with various policy arguments. As the Court has previously observed, however, "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." See *Tower* v. *Glover*, 467 U.S. 914, 922-923 (1984).

1. *Standard for Identifying Grand Jury "Complaining Witnesses."* The government complains that we "do[] not explain why, on [our] theory, liability would not attach to the testimony of *any* grand jury witness, whether a 'complaining witness' or not." U.S. Br. 21. But the common law distinguished between complaining witnesses and other witnesses, and that same distinction applies in Section 1983 actions.

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stands outside the Fourth Amendment." Brief for the Int'l Mun. Lawyers Ass'n *et al.* at 25-26. But, as the government notes, the courts of appeals have reached different conclusions regarding this argument and the question is not presented here. U.S. Br. 30-31. The Municipal Lawyers also raise a causation argument, contending that "an investigator cannot be held liable for the course of a criminal prosecution because a prosecutor's independent litigating decision is a break in the chain of causation." Brief for the Int'l Mun. Lawyers Ass'n *et al.* at 21. This causation argument turns on factual issues (including an exception that the Municipal Lawyers acknowledge for cases in which an investigator misleads a prosecutor). In addition, the argument, if accepted, could call into question the decisions in *Malley* and *Kalina*, because the judges' decisions to issue a warrant could similarly be characterized as a break in the causal chain. Again, this argument was not raised below, is not properly before the Court, and—even on these *amici*'s view—turns on case-specific factual issues.

Liability in the nineteenth century did not turn on a defendant's *status*; rather, it turned upon the *elements* of the malicious prosecution tort that were needed to establish a suit at common law. See, *e.g.*, *Kalina*, 522 U.S. at 134 (Scalia, J., concurring) (noting that the common law "did not recognize two kinds of witness; it recognized two different torts," including a malicious prosecution tort).

To sustain a malicious prosecution claim, a plaintiff was required to prove three distinct elements: (1) that "the alleged prosecution had come to a legal conclusion in the plaintiff's favor"; (2) that the defendant did not have probable cause "in *setting the criminal law in motion*"; and (3) that the defendant "acted from malicious motives." *Hamilton* v. *Smith*, 39 Mich. 222, 225-226 (1878) (emphasis added). Proof that the defendant's conduct "set[] the law in motion" was thus a settled *element* of the offense of malicious prosecution.[11] That element served to distinguish complaining witnesses from other witnesses. And that common-law distinction extends to claims under Section 1983.

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[11] See Francis Taylor Piggott, *Principles of the Law of Torts* 275 (1885) ("To entitle a plaintiff to a verdict in an action for malicious prosecution it is essential for him to prove * * * absence of reasonable and probable cause in *setting the law in motion* * * *.") (emphasis added); *Clark* v. *Carroll*, 59 Md. 180, 183 (1883) ("This suit is for injury done maliciously * * * by *setting in motion*, without probable cause, the ordinary legal proceedings whereby indictment was found against the plaintiff * * *.") (emphasis added); *Closson* v. *Staples*, 42 Vt. 209, 216 (1869) ("[I]f a party falsely and maliciously and without probable cause *put the law in motion*, that is properly a subject of * * * the well-known actions for malicious prosecutions." (emphasis added) (internal quotation marks omitted)).

2. *Uncertainty About Identifying Who Is A Complaining Witness.* The government next asserts that our "rule would also put courts in the difficult position of determining, on a case-by-case basis, whether a particular grand jury witness's testimony is sufficient to render him or her a 'complaining witness.'" U.S. Br. 22; see also Resp. Br. 38-41.

But this argument is not limited to claims resting on grand jury testimony—it would logically extend to identifying the witness whose conduct "set the wheels of government in motion" in any precharge context. Elsewhere in its brief, however, the government asserts that complaining witness liability may properly be found on *non*-grand-jury conduct. U.S. Br. 26 (asserting that "a non-testimonial act that induces a prosecutor to 'set the wheels of government in motion,' *Wyatt*, 504 U.S. at 164, is not entitled to absolute immunity"). The government does not explain how to reconcile these inconsistent contentions.

In any event, courts have had very little difficulty determining who is and is not a complaining witness. Complaining witnesses have for more than two centuries been subject to liability for malicious prosecution actions in state courts. Further, the vast majority of post-*Malley* cases have not been confounded by this question.[12]

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[12] See, *e.g.*, *Baker* v. *McNeil*, 711 F. Supp. 2d 1313 (N.D. Fla. 2010) (proceeding directly to consider whether the complaining witness was credible); *Alcantara* v. *City of New York*, 646 F. Supp. 2d 449, 458 (S.D.N.Y. 2009) ("The evidence is clear that despite the plaintiff's argument to the contrary, the defendants were not complaining witnesses against the plaintiff for purposes of bringing charges against him."); *Brown* v. *City of*

The instant case demonstrates why the issue frequently is not difficult to resolve. Respondent was the single witness in the grand jury sessions that resulted in two of the three indictments, and his investigations were crucial to instigating the criminal proceedings against Rehberg. The court of appeals took as given that "Paulk was the sole complaining witness against Rehberg before the grand jury." Pet. App. 4a. The district court similarly had assumed Paulk's complaining witness status. Pet. App. 83a. Indeed, respondent's "complaining witness" status has never been seriously at issue in this case.

3. *Complaining Witnesses at Trial.* The government also complains that we "do[] not explain why, if [we are] correct, a 'complaining witness' could not be sued for false statements made at trial, as well as before the grand jury." U.S. Br. 21. But this complaint misunderstands the role of a complaining witness, who "set[s] the wheels of government in motion by instigating a legal action." *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992). Once the trial has commenced, the wheels of government are already turning—there

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Oneonta, N.Y., 160 F.R.D. 18 (N.D.N.Y. 1995) (bypassing the identification of the complaining witness and moving to whether the complaining witness's identity must be disclosed). Very few district court cases from the 25-year dataset have found it necessary to adjudicate whether an individual is a complaining witness. In these cases, the examination is brief, especially in comparison to other legal issues discussed in the decision. See, *e.g.*, *Kerns* v. *Bd. of Comm'rs of Bernalillo Cnty.*, 707 F. Supp. 2d 1190 (D.N.M. 2010); *Mata* v. *Anderson*, 760 F. Supp. 2d 1068 (D.N.M. 2009); *Toler* v. *Paulson*, 551 F. Supp. 2d 1039 (E.D. Cal. 2008); *Finwall* v. *City of Chicago*, 490 F. Supp. 2d 918 (N.D. Ill. 2007); *Franklin* v. *Terr*, 294 F. Supp. 2d 1145 (N.D. Cal. 2003); *Cipolla* v. *County of Rensselaer*, 129 F. Supp. 2d 436 (N.D.N.Y. 2001); *Cignetti* v. *Healy*, 89 F. Supp. 2d 106 (D. Mass. 2000); *Cervantes* v. *Jones*, 23 F. Supp. 2d 885 (N.D. Ill. 1998).

simply could be no basis for complaining witness liability grounded in trial testimony.

4. *Effect on Witness Candor and Cooperation Incentives.* Respondent complains that allowing liability for a complaining witness's grand jury testimony would encourage witnesses to engage in self-censorship and otherwise burden law enforcement officers with litigation. Resp. Br. 34-37. But a complaining witness, unlike the witness in *Briscoe*, is no ordinary trial fact witness; because of his role in initiating a prosecution, an added layer of caution is, in fact, desirable. As this Court noted in *Malley*, liability may motivate a complaining witness to "reflect * * * upon whether he has a reasonable basis for believing that his affidavit establishes probable cause * * * * [S]uch reflection is desirable, because it reduces the likelihood that the [request] will be premature." *Malley*, 475 U.S. at 343. False testimony before a grand jury is "at best a waste of judicial resources [and at worst], lead[s] to premature arrests, which may injure the innocent or * * * benefit the guilty." *Id.* at 343-344.

Moreover, complaining witnesses are still protected by qualified immunity, which broadly shields all but "the plainly incompetent or those who knowingly violate the law." *Id.* at 341.

Respondent contends that prosecutors' ethical duty to seek justice is a sufficient check against false grand jury testimony by a complaining witness. Resp. Br. 11. This argument is contradicted by the facts of the instant case. Nor is there plausible merit to the government's claim in passing (U.S. Br. 16) that grand jurors themselves will serve as meaningful checks on a witness who is bent on testifying falsely. Grand jurors have no more ability than the judges issuing the arrest warrants in *Malley* and *Kalina* to independently assess the veracity of a complaining witness.

5. *Effect on Grand Jury Secrecy*. Respondent and the government assert that allowing claims against complaining witnesses for their false grand jury testimony will jeopardize grand jury secrecy. Resp. Br. 41; U.S. Br. 13-14. But these concerns are overstated or altogether meritless.

To begin with, there is no reason to believe an intrusion on grand jury secrecy will be inevitable. Evidence can be obtained through a deposition of the defendant, which does not in any way violate the secrecy principle.

In seven judicial circuits, complaining witnesses have only qualified immunity rather than absolute immunity for their grand jury testimony. Pet. Br. 26.[13] No court has suggested that the resulting inquiry is invasive or intractable, nor have depositions of grand jurors been required to determine who they believed the complaining witness was.

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[13] Respondent claims that eight circuits support absolute immunity for grand jury testimony based on *Briscoe*; notably, all eight opinions respondent cites preceded this Court's decision in *Kalina*. See Resp. Br. 18. Four of those circuits now recognize that complaining witnesses receive only qualified immunity for their grand jury testimony. See *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Kulas* v. *Flores*, 255 F.3d 780, 783 n.1 (9th Cir. 2001); *Cervantes* v. *Jones*, 188 F.3d 805, 809 (7th Cir. 1999); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 419 (D.C. Cir. 1991). The salient distinction in the malicious prosecution context is not between trial and pretrial but between complaining and non-complaining witnesses.

At most, a malicious prosecution claim might require a breach of grand jury secrecy only to obtain a transcript of the testimony of the complaining witness. There is no merit to respondent's claim (Resp. Br. 41) that testimony from grand jurors themselves would be required. The malicious falsity and its materiality to the grand jury's function can be shown by evidence extrinsic to the grand jury's deliberation process.

Exceptions to the grand-jury secrecy rule have long been recognized under state and federal law. *E.g.*, Fed. R. Crim. P. 6(e)(3)(E) ("The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter * * * preliminarily to or in connection with a judicial proceeding."). This Court has explained that disclosure of grand jury materials is appropriate "where the need for it outweighs the public interest in secrecy" and "the burden of demonstrating this balance rests upon the private party seeking disclosure." *Douglas Oil Co. of Cal.* v. *Petrol Stops Nw.*, 441 U.S. 211, 223 (1979). "It is * * * clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Ibid.*[14] "[A] court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion."

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[14] A claim typically will arise—as in the instant case—only after a criminal proceeding has been terminated in a criminal defendant's favor. See *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994). Any inquiry at that time into matters that occurred before the grand jury poses no risk to an ongoing grand jury investigation for which secrecy is needed.

Ibid.; see also *Law* v. *United States*, 488 A.2d 914, 916 (D.C. 1985) (holding that a trial court has "substantial discretion" but should "conduct an *in camera* inspection of the requested grand jury materials" when deciding whether to grant the materials for a malicious prosecution suit).

In short, none of respondent's policy objections comes close to justifying rejection of the common-law rule subjecting complaining witnesses to liability based on their testimony before a grand jury.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

JEFFREY A. MEYER
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

BRYAN A. VROON
Law Offices of Bryan A. Vroon LLC
1718 Peachtree Street Suite 1088
Atlanta, GA 30309
(404) 607-6712

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Petitioner

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AMICUS
CURIAE
BRIEF

No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG, PETITIONER

v.

JAMES P. PAULK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

TONY WEST
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

BARBARA L. HERWIG
MICHAEL P. ABATE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a government official may be held liable in a civil damages action for testimony before a grand jury.

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In the Supreme Court of the United States

No. 10-788

CHARLES A. REHBERG, PETITIONER

v.

JAMES P. PAULK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the circumstances in which federal officers can be liable in civil actions for violations of constitutional rights. Although this case involves a claim against state officials under 42 U.S.C. 1983, this Court has invoked its Section 1983 jurisprudence in cases involving the implied cause of action against federal officers for the deprivation of constitutional rights, recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See, *e.g.*, *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993).

STATEMENT

1. In 2003 and 2004, petitioner sent a series of anonymous faxes criticizing the management of a hospital in Albany, Georgia. In response, and allegedly as a favor to the hospital's politically connected management, respondents Kenneth Hodges (the Dougherty County, Georgia, District Attorney) and James Paulk (his chief investigator) launched a criminal investigation of petitioner. Hodges eventually recused himself and appointed a special prosecutor, respondent Kelly Burke (an Assistant District Attorney), but Hodges allegedly remained involved in the investigation. Pet. App. 3a-4a.

In December 2005, a grand jury in Dougherty County indicted petitioner for aggravated assault, burglary, and six counts of harassing phone calls. Pet. App. 4a. The indictment alleged that petitioner had assaulted Dr. James Hotz (a hospital physician) "after unlawfully entering Dr. Hotz's home." *Ibid*. Paulk was the only witness who testified before the grand jury. Paulk later admitted that he "never interviewed any witnesses or gathered evidence indicating [petitioner] committed an aggravated assault or burglary." *Id.* at 4a-5a. In fact, Dr. Hotz had not even reported an assault or a burglary. *Id*. at 5a. Moreover, the charges of "'harassing' phone calls to Dr. Hotz all were related to the faxes Rehberg had already sent criticizing the hospital." *Ibid.* Petitioner challenged the sufficiency of the indictment, and the special prosecutor dismissed it. *Ibid.*

In February 2006, the grand jury indicted petitioner again, charging him with assault and five counts of "harassing phone calls." Pet. App. 5a. This time both Paulk and Dr. Hotz testified. Once again petitioner challenged the sufficiency of the indictment, and it was eventually dismissed. *Ibid.*

Petitioner was indicted for a third time in March 2006, just two weeks after the second indictment was returned (and months before that indictment was dismissed). The charges were simple assault and harassing telephone calls. Petitioner was arrested and briefly detained following the return of the second and third indictments. Pet. App. 6a. The court ultimately dismissed the third indictment. *Ibid.*

2. Petitioner sued Paulk, Hodges, Burke, and Dougherty County under 42 U.S.C. 1983, alleging malicious prosecution (Paulk and Hodges); retaliatory prosecution (Paulk and Hodges); fabrication of evidence, calling a witness to give false testimony, and giving false statements to the media (Burke); and conspiracy to violate Rehberg's First, Fourth, and Fourteenth Amendment rights (Paulk, Burke, and Hodges). He also asserted state-law claims and claims against Dougherty County. Pet. App. 6a-7a. The district court dismissed the county from the suit but denied motions to dismiss filed by the individual defendants. *Id.* at 81a-108a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-44a. As relevant here, the court held that Paulk and Hodges were entitled to absolute immunity from petitioner's malicious-prosecution claim insofar as the claim rested on Paulk's perjured grand jury testimony. *Id.* at 12a-14a. The court relied on *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), in which this Court held that a police officer was entitled to absolute immunity from a civil damages action arising out of his allegedly false trial testimony, as well as circuit precedent applying *Briscoe*'s rule of absolute immunity to grand jury testimony. Pet. App. 12a. The court acknowledged petitioner's allegation that Paulk "was the sole 'complaining witness' before the grand jury," but

declined to "carv[e] out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." *Id.* at 13a (quoting *Jones* v. *Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999). The court explained that "allowing civil suits for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings." *Ibid.*

In light of Paulk's testimonial immunity, the court of appeals held that both Hodges and Paulk were absolutely immune from liability for their alleged pre-indictment conspiracy to fabricate Paulk's false testimony. Pet. App. 15a-18a. The court explained that to allow liability to be based on conspiracy allegations "would be to permit through the back door what is prohibited through the front." *Id.* at 16a (quoting *Jones*, 174 F.3d at 1289).

The court of appeals also ordered the dismissal of petitioner's other claims, except for petitioner's retaliatory-prosecution claim against Paulk. Pet. App. 44a; *id.* at 34a.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that a government official who testifies as a witness in ongoing judicial proceedings, including before a grand jury, is entitled to absolute immunity from civil damages actions based on his testimony. An official is not, however, absolutely immune for other acts that cause criminal proceedings to be initiated.

A. This Court has interpreted 42 U.S.C. 1983 "in harmony with general principles of tort immunities and defenses," including the common-law immunity of certain government officials from civil damages actions arising out of their official conduct. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). The Court has adopted a functional approach under which absolute immunity protects public officials from liability for tasks "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Following that functional approach in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), the Court held that official witnesses at a criminal trial are absolutely immune from civil damages actions based on their testimony.

B. Although the Court in *Briscoe* had no occasion to consider the immunity of grand jury witnesses, the considerations underlying its rule of absolute witness immunity are fully applicable in the grand jury context. Just as at trial, a grand jury witness who fears future litigation might be "reluctant to come forward to testify" or "might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Briscoe*, 460 U.S. at 333. A rule that extends absolute immunity to grand jury witnesses is, moreover, consistent with other applications of the Court's functional analysis, under which immunity attaches to many participants in pretrial judicial proceedings, including prosecutors and the grand jurors themselves.

C. Petitioner urges this Court to create an exception to the rule of absolute witness immunity for those grand jury witnesses who might be called "complaining witnesses." Petitioner borrows the term from *Malley* v. *Briggs*, 475 U.S. 335 (1986), in which the Court held that an officer who procures proceedings against a defendant by submitting an affidavit in support of a request for an arrest warrant is not absolutely immune from a civil damages action. But the Court in *Malley* used the term "complaining witness" to describe a person "who procured the issuance of an arrest warrant by submitting a complaint," not a person who gave testimony in judicial proceedings. *Id.* at 340. Under *Malley*, a person who initiates or procures a prosecution may be liable in a common-law action for malicious prosecution, or in a Section 1983 action for a constitutional claim analogous to malicious prosecution, whether or not he is a "witness" before the grand jury or at trial. But *Malley* does not suggest that liability may be based on testimony given in ongoing judicial proceedings, including before a grand jury. The result in *Malley* reflects a functional distinction between accusations offered during an ongoing judicial proceeding, which are subject to absolute immunity, and accusations made to initiate such a proceeding, which are not.

Petitioner's proposed "complaining witness" exception could well extend beyond the subset of witnesses who might be considered "complaining witnesses," or even beyond those who testify in grand jury proceedings. And even if it could be limited to the grand jury context, a "complaining witness" exception would embroil courts in unavoidably imprecise calculations about whether a particular witness's testimony could be said to have been the primary, or at least a sufficient, cause of the grand jury's decision to return the indictment. By contrast, a rule of absolute immunity for grand jury witness testimony eliminates any need for courts to probe the decisionmaking processes of the grand jury, as well as the risk that witnesses will shade their testimony for fear of monetary liability.

D. Although this Court has not strictly adhered to the common law of official immunities, application of the Court's functional analysis in this context yields results similar to those that would have obtained at common law. At common law, witnesses enjoyed absolute immunity from defamation actions, but there was no immunity from malicious-prosecution actions. In nearly all of the cases in which the common law would have permitted a malicious-prosecution action, the plaintiff will be able to identify some non-testimonial act of initiation or procurement that can serve as a basis for liability.

E. Under a proper application of this Court's immunity analysis, a defendant has no absolute immunity for procuring or inducing a malicious prosecution, so long as the alleged means of procurement or inducement was not testimony in a judicial proceeding. Because the court of appeals did not apply that test, this Court should remand to permit that court to determine, in the first instance, whether petitioner's complaint adequately states a claim.

ARGUMENT

GRAND JURY WITNESSES ARE ABSOLUTELY IMMUNE FROM CIVIL DAMAGES ACTIONS BASED ON THEIR TESTIMONY

A. Public Officials Are Entitled To Absolute Immunity From Civil Damages Actions When Performing Functions Intimately Associated With The Judicial Process

1. Section 1983 of Title 42, United States Code, creates a private cause of action against "[e]very person" who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Even though the statute "on its face admits of no immunities," this Court

has held that Section 1983 must "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U.S. 409, 417-418 (1976). The Court has accordingly "concluded that immunities 'well grounded in history and reason'" were not "abrogated 'by covert inclusion in the general language' of [Section] 1983," *id.* at 418 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)).

In determining whether a government official is protected by absolute immunity or qualified immunity in a Section 1983 action, the Court conducts "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. The Court employs a "functional" approach that "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)).

2. Under the Court's functional approach, officials who would have received absolute immunity at common law, such as judges and legislators, continue to receive absolute immunity from Section 1983 actions arising from performance of their duties. *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967) (judges entitled to absolute immunity for acts within their jurisdiction); *Tenney*, 341 U.S. at 372-375 (legislators entitled to absolute immunity for their legislative activities). In addition, the Court has recognized "that some officials perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted [Section] 1983, deserve absolute protection from damages liability." *Buckley*, 509 U.S. at 268-269 (quot-

ing *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)); see *Kalina* v. *Fletcher*, 522 U.S. 118, 131-133 (1997) (Scalia, J., concurring) (discussing differences between Court's functional approach and common-law immunity rules). In particular, the Court has concluded that absolute immunity shields public officials who perform tasks "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430.

This Court has consistently accorded absolute immunity to persons performing such functions, even in the absence of a precise "parallel immunity at common law." Pet. Br. 12. For example, grand jurors, who perform a "quasi-judicial" function, are entitled to absolute immunity, *Imbler*, 424 U.S. at 423 n.20, even though quasi-judicial officers received only a qualified immunity at common law, see *Burns* v. *Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). The same is true of hearing examiners and administrative law judges, who had no precise common-law analogues. *Butz*, 438 U.S. at 513. Likewise, prosecutors are protected by absolute immunity whenever they are performing "the traditional functions of an advocate," *Kalina*, 522 U.S. at 131, including initiating a prosecution, *Imbler*, 424 U.S. at 431; presenting the government's case, *ibid.*; participating in a probable-cause hearing, *Burns*, 500 U.S. at 487; or managing a trial-related information system, *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 864 (2009). That is so even though the "common-law tradition of prosecutorial immunity * * * developed much later than 1871," when Section 1983 was enacted. *Burns*, 500 U.S. at 505 (Scalia, J., concurring in the judgment in part and dissenting in part); see *Kalina*, 522 U.S. at 124 n.11 (noting that the Court's prosecutorial-immunity jurisprudence has been drawn both from post-1871 cases and, "perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors"). Finally, and of particular relevance here, trial witnesses are entitled to absolute immunity from all civil damages actions based on their testimony, even though the common-law immunity of witnesses applied only in defamation actions. *Briscoe* v. *LaHue*, 460 U.S. 325, 332 (1983); see *id.* at 350-351 (Marshall, J., dissenting); pp. 24-26, *infra*.

On the other hand, when officials perform functions "further removed from the judicial phase of criminal proceedings," they are entitled only to qualified immunity. *Malley*, 475 U.S. at 342. Thus, judges lack absolute immunity from suits based on actions that are not taken in their judicial capacity, such as decisions to demote or fire an employee. *Forrester*, 484 U.S. at 229-230. Prosecutors, too, enjoy only qualified immunity for investigative and administrative acts, such as attesting to affidavits in support of arrest warrants, *Kalina*, 522 U.S. at 130-131; developing evidence during a police investigation, *Buckley*, 509 U.S. at 272-276; making statements at a press conference, *id.* at 276-278; or giving legal advice to police officers, *Burns*, 500 U.S. at 489-490.

3. This Court has "interpreted § 1983 to give absolute immunity to functions 'intimately associated with the judicial phase of the criminal process,' not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986) (citation and emphasis omitted). The Court has recognized that, in the absence of immu-

nity, the threat of "harassment by unfounded litigation" could cause judges and prosecutors to "shade [their] decisions instead of exercising the independence of judgment required by [their] public trust." *Imbler*, 424 U.S. at 423.

Similarly, in extending absolute immunity to a police officer accused of giving false trial testimony in *Briscoe*, the Court explained that a contrary rule might make witnesses "reluctant to come forward to testify" or "distort[]" their testimony for "fear of subsequent liability." *Briscoe*, 460 U.S. at 333; see *ibid.* ("A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence."). Furthermore, "[s]ubjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties," particularly since "[p]olice officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses." *Id.* at 343. Although the Court recognized that "absolute witness immunity bars another possible path to recovery" for criminal defendants injured by a police officer's perjury, "the alternative of limiting the official's immunity would disserve the broader public interest." *Id.* at 345.

B. Under This Court's Functional Analysis, Grand Jury Witnesses Enjoy Absolute Immunity From Civil Damages Actions Based On Their Testimony

The Court in *Briscoe* had no occasion to consider whether the absolute immunity that attaches to trial testimony similarly attaches to testimony in pretrial proceedings. 460 U.S. at 329 n.5. In the wake of *Briscoe*, however, nearly every court of appeals to consider the question has "afforded absolute immunity to witnesses * * * for their allegedly perjurious testimony at various types of pretrial proceedings," including grand jury proceedings. *Curtis* v. *Bembenek*, 48 F.3d 281, 284 (7th Cir. 1995); accord, *e.g.*, *Lyles* v. *Sparks*, 79 F.3d 372, 378 (4th Cir. 1996); *Strength* v. *Hubert*, 854 F.2d 421, 423-425 (11th Cir. 1988); *Williams* v. *Hepting*, 844 F.2d 138, 142 (3d Cir. 1988); *Little* v. *City of Seattle*, 863 F.2d 681, 684 (9th Cir. 1988); *Macko* v. *Byron*, 760 F.2d 95, 97 (6th Cir. 1985); *San Filippo* v. *U.S. Trust Co. of N.Y., Inc.*, 737 F.2d 246, 254 (2d Cir. 1984); *Briggs* v. *Goodwin*, 712 F.2d 1444, 1448-1449 (D.C. Cir. 1983). But see *Keko* v. *Hingle*, 318 F.3d 639, 643 & n.6 (5th Cir. 2003) (recognizing a contrary rule for probable-cause hearings, while leaving open the possibility that immunity might attach in grand jury proceedings). That conclusion is consistent with the functional analysis applied in this Court's absolute-immunity cases.

1. The functional considerations underlying immunity for trial witnesses apply with equal force in the context of grand juries. "The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution." *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983). This Court has described grand jury proceedings as "judicial proceedings," *Uni-*

ted States v. *Mandujano*, 425 U.S. 564, 575-576 (1976), and it has held that grand jurors perform a "quasi-judicial" function by exercising "discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U.S. at 423 n.20.

In order to carry out their constitutionally assigned functions, grand juries have "a right to every man's evidence." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)); accord *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973) (noting "the historically grounded obligation of every person to appear and give his evidence before the grand jury"); see *Branzburg*, 408 U.S. at 687 (grand juries enjoy "constitutional prerogatives * * * rooted in long centuries of Anglo-American history") (quoting *Hannah* v. *Larche*, 363 U.S. 420, 489-490 (1960) (Frankfurter, J., concurring in the judgment). Just as at a trial, the prospect of litigation might make potential witnesses reluctant to appear before a grand jury. See *Briscoe*, 460 U.S. at 333. And just as at a trial, "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined" to shade his testimony in a manner that would "deprive the finder of fact of candid, objective, and undistorted evidence." *Ibid.*

Premising liability on grand jury testimony would also undermine the "long-established policy that maintains the secrecy of * * * grand jury proceedings." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); see Fed. R. Crim. P. 6(e). This Court has "recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," *Douglas Oil Co.* v. *Petrol Stops N.W.*, 441 U.S. 211, 218 (1979), and that "[t]he grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow," *Procter & Gamble*, 356 U.S. at 682. If statements by grand jury witnesses could provide a basis for civil liability, the litigation arising from such statements would inevitably compromise grand jury secrecy.

2. A rule that extends absolute immunity to grand jury witnesses is consistent with other applications of this Court's functional analysis, under which immunity attaches to many participants in pretrial judicial proceedings. For example, prosecutors are absolutely immune for initiating prosecutions, *Imbler*, 424 U.S. at 431, participating in probable-cause hearings, *Burns*, 500 U.S. at 492, and appearing before grand juries, *id.* at 490 n.6 (noting "widespread agreement among the Courts of Appeals"). Likewise, grand jurors themselves receive absolute immunity. *Cleavinger* v. *Saxner*, 474 U.S. 193, 200 (1985); *Imbler*, 424 U.S. at 423 n.20. Those rules make sense as part of a functional immunity analysis that is designed to safeguard a judicial process that begins long before trial. They also indicate that petitioner is incorrect to suggest that "the *Briscoe* Court's use of the terms 'judicial proceeding' and 'judicial process' must be understood as referring to criminal trials" and not pretrial proceedings. Pet. Br. 17 n.10 (quoting 460 U.S. at 334-335) (citation omitted).

This Court has, in fact, recognized that the functional considerations underlying *Briscoe* are implicated in pretrial proceedings. In *Burns*, the Court considered whether a prosecutor should receive absolute immunity for participation in a search-warrant hearing. 500 U.S. at 481. It described that issue as "similar to" the question in *Briscoe*, and it noted that the common-law immunity recognized in that case "extended to 'any hearing before a tribunal which perform[ed] a judicial function.'" *Id.* at 490 (quoting William Prosser, *Law of Torts* § 94, at 826-827 (1941), and citing Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 487-488 (1909) (Veeder)). The Court cited its decision in *Yaselli* v. *Goff*, 275 U.S. 503 (1927) (per curiam), which summarily affirmed "a decision by the * * * Second Circuit in which that court had held that the common-law immunity extended to a prosecutor's conduct before a grand jury," *Burns*, 500 U.S. at 490; see *Yaselli* v. *Goff*, 12 F.2d 396, 401-402 (2d Cir. 1926) (prosecutor absolutely immune from a malicious-prosecution claim based on his participation in grand jury proceedings); see also Veeder, 9 Colum. L. Rev. at 488 n.78 (common-law testimonial immunity extended to "communications to a grand jury," whose proceedings "are unquestionably judicial in character").

3. Petitioner contends (Br. 24-26) that perjury before a grand jury is both harmful to those wrongly accused and subversive of the truth-seeking function of the judicial process. That is certainly true, but it is also true of perjury at trial, for which a witness is nevertheless entitled to absolute immunity. As the Court made clear in *Briscoe*, absolute immunity does not leave the public powerless to remedy such misconduct. A grand jury witness who gives false testimony remains liable to criminal prosecution for perjury. See, *e.g.*, 18 U.S.C. 1621; Ga. Code Ann. § 16-10-70 (2007). Moreover, "official witnesses may be punished criminally for willful deprivations of constitutional rights." *Briscoe*, 460 U.S. at 345 n.32 (citing 18 U.S.C. 242).

Emphasizing that grand jury proceedings are *ex parte*, petitioner also asserts (Br. 26) that, absent the prospect of civil liability for at least some set of grand jury witnesses, "the distorting effects of false testimony before the grand jury could well go unchecked." Petitioner is correct (Br. 21) that grand jury proceedings do not afford defendants an opportunity to cross-examine witnesses or to put on their own evidence. But it is the role of the grand jurors themselves to act "as a primary security to the innocent against hasty, malicious and oppressive persecution." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); accord *Branzburg*, 408 U.S. at 687 n.23. Moreover, proceedings before a grand jury are only the first stage in a judicial process that includes an adversarial trial. Cf. *Imbler*, 424 U.S. at 427 (noting, as one rationale for absolute prosecutorial immunity, the availability of "post-trial procedures * * * to determine whether an accused has received a fair trial").

It is true that, in some cases, absolute immunity might leave a defendant without effective redress against a grand jury witness who has given false testimony under oath. But immunity rules must take account of the interests of the judicial system as a whole. See *Briscoe*, 460 U.S. at 345. In the context of suits alleging that officials offered false trial testimony, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Ibid.* (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950)). In that context, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Id.* at 332-333 (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)). That reasoning is equally applicable in this context. A rule designed to ensnare only the dishonest grand jury witness will necessarily create uncertainty for every witness who testifies, thereby undermining the truth-seeking function of the grand jury.

C. Grand Jury Witnesses Enjoy Absolute Immunity For Their Testimony Even If They Can Also Be Described As "Complaining Witnesses"

Relying on this Court's decision in *Malley*, petitioner argues that, even if grand jury witnesses are ordinarily entitled to absolute immunity, a "complaining witness" is not. That argument, which rests on a misreading of *Malley*, cannot be squared with this Court's functional analysis and would produce intractable problems of administration.

1. In *Malley*, this Court held that a defendant police officer was not entitled to absolute immunity for presenting a judge with a criminal complaint and supporting affidavit in order to secure an arrest warrant. 475 U.S. at 339-345. In so holding, the Court rejected the officer's argument that he was entitled to absolute immunity because "his function in seeking an arrest warrant was similar to that of a complaining witness." *Id.* at 340. "The difficulty with this submission," the Court explained, "is that complaining witnesses were not absolutely immune at common law." *Ibid.* Rather, "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Id.* at 340-341. The Court similarly rejected the officer's other arguments for absolute immunity, concluding that, "[i]n the case of the officer applying for a warrant, * * * the

judicial process will on the whole benefit from a rule of qualified rather than absolute immunity." *Id.* at 343.

The Court in *Malley* created no exception to the rule of absolute witness immunity recognized in *Briscoe*. By using the term "complaining witness," *Malley* did not suggest that any witness who testified against a defendant could be sued by that person in a civil damages action based on his testimony. The Court instead used the term to describe a person "who procured the issuance of an arrest warrant by submitting a complaint." 475 U.S. at 340; see *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992) (a complaining witness "set[s] the wheels of government in motion by instigating a legal action"); see also *Van de Kamp*, 129 S. Ct. 861 (noting the absence of immunity "when a prosecutor acts as a complaining witness in support of a warrant application"); *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (complaining witness was "the private party bringing the suit"). In other words, the "complaining witness" described by the Court in *Malley* was not a witness at all, in the sense of a person who provides testimony in a judicial proceeding. The use of the word "'witness' in 'complaining witness' is misleading," therefore, because at common law, "a 'complaining witness' could be sued for malicious prosecution whether or not he ever provided factual testimony, so long as he had a role in initiating or procuring the prosecution." *Kalina*, 522 U.S. at 135 (Scalia, J., concurring) (citation omitted); see Restatement (Second) of Torts § 653 cmt. c (1977) (Restatement) (describing "complaining witness[]" as a synonym for "private prosecutor," "complainant," or "accuser," with all of the terms meaning "a private person who initiates criminal proceedings").

Under *Malley*, a person who "procure[s]" the issuance of an indictment or otherwise "set[s]" the wheels of a prosecution in motion may be liable for malicious prosecution. 475 U.S. at 340; see Restatement § 653 (explaining that a person may be liable for malicious prosecution when he "initiates or procures the institution of criminal proceedings against another"); see also *Kalina*, 522 U.S. at 129, 130-131 (applying the rule of *Malley* to prosecutor's act of personally attesting to the truth of the facts set forth in a certification submitted as part of an application for an arrest warrant). That the person happens later to be a witness would not shield him from liability for any actionable harms associated with his earlier acts of procurement. But nothing in *Malley* or any of this Court's cases applying it suggests that witnesses may be held liable for words spoken on the stand.

2. Petitioner contends (Br. 23) that the logic of *Malley* nevertheless extends at least to those grand jury witnesses who can be described as "complaining witnesses"—*i.e.*, those witnesses who testify to "facts that 'set the wheels of government in motion.'" Pet. Br. 11 n.6 (quoting *Wyatt*, 504 U.S. at 164-165)). In his view, there is no reason to draw a distinction between an officer who procures proceedings against a defendant by submitting an affidavit in support of a request for an arrest warrant and an officer "whose grand jury testimony triggers the issuance of an indictment." *Id.* at 9.

This Court has, however, recognized a functional distinction between accusations offered during an ongoing judicial proceeding and accusations made in order to initiate such a proceeding. In *Malley*, the Court noted that the act of swearing out an affidavit in support of a request for an arrest warrant, "while a vital part of the administration of criminal justice," is "further removed from the judicial phase of criminal proceedings" than are acts subject to immunity, such as a trial witness's testimony or a prosecutor's attempt to obtain an indictment. 475 U.S. at 342-343. The functional immunity of a testifying witnesses therefore does not attach to any person who unilaterally decides to make an accusation in the hopes of instigating a proceeding. *Ibid.*; see *Kalina*, 522 U.S. at 129-130. But where, as here, a prosecutor has decided to convene a grand jury—an act that is shielded by absolute immunity, *Malley*, 475 U.S. at 343—any testimony offered by the witness in the course of the ensuing grand jury proceeding is subject to the rule of absolute witness immunity recognized in *Briscoe*. See pp. 12-15, *supra*.

While it is true, as petitioner observes (Br. 23-24), that some States employ grand juries and others do not, it does not follow that application of the functional test for immunity will lead to arbitrary results. The test simply takes account of the reality that different functional considerations are present in the different regimes. Whereas "every consideration of public policy requires that [witnesses] should be as fearless in testifying as judge and jury are independent in weighing their testimony," the same considerations do not attach to "a voluntary affidavit made when no cause is pending." Veeder, 9 Colum. L. Rev. at 476, 477 n.41; see *Maloney* v. *Bartley*, 170 Eng. Rep. 1357, 1357-1358 (1812) (testimony or affidavits submitted "in the course of a judicial proceeding" were immunized from liability, whereas "voluntary and extrajudicial" affidavits were not). In both *Malley* and *Kalina*, it was the official himself who "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-165; see *Malley*, 475 U.S. at 337-338. When grand jury proceedings have already begun, however, all persons summoned before the grand jury must be able to testify freely without fear of subsequent civil liability. An officer should not be put to the choice of subjecting himself to potentially harassing litigation or contempt.

3. In advocating a rule that would abrogate absolute witness immunity for the grand jury testimony of a "complaining witness," petitioner draws two distinctions that lack any basis in precedent or logic.

First, petitioner does not explain why, on his theory, liability would not attach to the testimony of *any* grand jury witness, whether a "complaining witness" or not. His arguments (Br. 25-26) based on the nonadversarial nature of grand jury proceedings are equally applicable to all grand jury witnesses. But as explained above, see p. 12, *supra*, there has long been general agreement that grand jury witnesses ordinarily enjoy absolute immunity from damages actions based on their testimony, and petitioner does not appear to take issue with that proposition.

Second, petitioner does not explain why, if he is correct, a "complaining witness" could not be sued for false statements made at trial, as well as before the grand jury. Indeed, petitioner cites, with apparent approval, a Ninth Circuit decision that has held just that. See Br. 27 n.17 (citing *Harris* v. *Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998)); see also *Cervantes* v. *Jones*, 188 F.3d 805, 809 (7th Cir. 1999 (stating that the "complaining witness" exception extends to "trial and pretrial testimony"), overruled on other grounds, *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). A plaintiff could presumably allege that such a witness had "take[n] an active part in continuing or procuring the continuation of criminal proceedings" and was therefore "subject to the same liability for malicious prosecution as if he had then initiated the proceedings." Restatement § 655. Indeed, in his petition, petitioner suggested that "the complaining witness exception * * * should not exclude grand jury *or other judicial testimony*." Pet. 24 (emphasis added). As petitioner now appears to recognize (Br. 16), however, that sweeping contention is contrary to *Briscoe*, which forbids civil suits based on the trial testimony of any witness. 460 U.S. at 326.

4. Petitioner's rule would also put courts in the difficult position of determining, on a case-by-case basis, whether a particular grand jury witness's testimony is sufficient to render him or her a "complaining witness." Although the inquiry may appear simple enough where, as here, the defendant was the only witness before the grand jury, see Pet. App. 83a, other cases will not be as straightforward. See, *e.g.*, *Keko*, 318 F.3d at 643 ("He may be a complaining witness; in any event, this case presents a question of fact as to the degree of his participation in the prosecution that, on this record, cannot be resolved on summary judgment."); *Anthony* v. *Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992) (remanding a case in which a grand jury witness asserted absolute immunity in order to determine whether the witness had been a "complaining witness"). To determine whether any particular witness "provide[d] the facts that 'set the wheels of government in motion by instigating a legal action,'" Pet. Br. 11 n.6 (citation omitted), would require unavoidably imprecise calculations about whether a particular witness's testimony was the primary—or perhaps even a sufficient—motivation for the grand jury to return an indictment. It would be difficult enough for courts to make that determination after the fact, but it

would often be impossible for a witness to determine, before testifying, whether he might ultimately be found to be a complaining witness. The resulting uncertainty would give every potential witness an incentive to engage in the kind of self-censorship that the Court in *Briscoe* sought to avoid.

5. Although a witness's testimony in the course of a judicial proceeding may supply "*evidence* of malice or initiation in [a] malicious prosecution suit," *Kalina*, 522 U.S. at 133 (Scalia, J., concurring), the Court's functional approach to witness immunity means that grand jury testimony cannot itself form the basis for civil damages liability. Nor, as most courts of appeals have correctly held, can an alleged conspiracy to present false grand jury testimony. See *Jones* v. *Cannon*, 174 F.3d 1271, 1288 (11th Cir. 1999) (collecting cases). A person may not be liable "for conspiring to commit an act that he may perform with impunity." *House* v. *Belford*, 956 F.2d 711, 720 (7th Cir. 1992).

Under the Court's functional approach, a plaintiff in petitioner's position must be able to point to some non-testimonial act of procurement in order to proceed. In fact, some of the cases on which petitioner relies involved just such non-testimonial acts. See Pet. Br. 26 n.17; *Anthony*, 955 F.2d at 1396 ("Anthony's malicious prosecution complaint challenges Baker's motivation and conduct in nearly all phases of the investigation and resulting criminal prosecution."). *Enlow* v. *Tishomingo County*, 962 F.2d 501, 511-512 (5th Cir. 1992) (noting "disputed factual issues * * * regarding the events that transpired prior to the grand jury testimony"). In a suit based on such an act, the inquiry will be whether the defendant "induc[ed]" the prosecutor to initiate the proceedings. Restatement § 653 cmt. d. Unlike the inquiry contemplated by petitioner, that inquiry will not require a court to probe the decisionmaking processes of the grand jury, nor will it run the risk of inducing grand jury witnesses to shade their testimony.

D. A Rule Of Absolute Immunity For Grand Jury Testimony Is Consistent With The Common Law

As explained above, this Court's functional analysis provides for immunity even in the absence of a precise common-law analogue. But see Pet. Br. 9 (asserting that "[t]he absence of immunity at common law is dispositive"). Indeed, "no analytical approach based upon 'functional analysis' can faithfully replicate the common law." *Kalina*, 522 U.S. at 135 (Scalia, J., concurring). Nevertheless, a proper application of the functional test closely approximates the results that would have obtained at common law.

1. Although *Malley* correctly described "the generally accepted" common-law rule that "one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause," 475 U.S. at 340-341, its statement that "complaining witnesses were not absolutely immune at common law," *id.* at 340, suggests a distinction between "witnesses" and "complaining witnesses" that "has little foundation in the common law of 1871." *Kalina*, 522 U.S. at 134 (Scalia, J., concurring). The common law in fact "did not recognize two kinds of witnesses; it recognized two different torts." *Ibid.* There was no special exception for "complaining witnesses"; instead, there was absolute immunity from defamation actions based on testimony, but there was no such immunity from malicious-prosecution actions.

At common law, no witness—including a grand jury witness—could be sued for defamation based on testimony given in a judicial proceeding. Thus, in *Rex* v. *Skinner*, 98 Eng. Rep. 529, 530 (K.B. 1772), Lord Mansfield declared that a judge could not be sued for comments made in a grand jury proceeding because "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office." See *Lake* v. *King*, 85 Eng. Rep. 137, 139 (K.B. 1667).

Early American courts likewise recognized that grand jury testimony could not be a basis for civil liability in defamation actions. In *Kidder* v. *Parkhurst*, 85 Mass. 393 (1862), for example, the Supreme Judicial Court of Massachusetts held that accusations made by a witness to a grand jury "appear[ed] to have been made in the regular course of justice" and therefore were not actionable as libel. *Id.* at 396. Likewise, in *Hastings* v. *Lusk*, 22 Wend. 410 (1839), New York's highest court held that a defendant was immune from a suit alleging that he slandered the plaintiff when testifying before a magistrate, because "complaints made to grand juries and magistrates" may not form the basis of a defamation action, even if "express malice as well as the absolute falsity of the charge can be established by proof." *Id.* at 417; see *Schultz* v. *Strauss*, 106 N.W. 1066, 1067 (Wis. 1906) (common-law witness-immunity rule applied to grand jury proceedings, which "are unquestionably judicial in character"); *Sands* v. *Robison*, 20 Miss. (12 S. & M.) 704, 712 (1849) (reversing slander verdict against a justice of the peace who had testified in a grand jury proceeding because "[t]he occasion * * * on which the words were spoken furnishes a *prima facie* excuse for their having been spoken"); Veeder, 9 Colum. L. Rev at 487-488 & n.78 ("The rule [of immunity] applies to and includes every publication which constitutes a step in, or arises out of, a judicial proceeding," including "communications to a grand jury.").

Conversely, in a malicious-prosecution action, even someone who testified as a witness could be sued if the person had engaged in acts that "procured" an indictment without probable cause. See, *e.g.*, ***Fitzjohn*** v. ***Mackinder***, 142 Eng. Rep. 199 (Exch. Chamber 1861); ***Dennis*** v. ***Ryan***, 65 N.Y. 385 (1865). The key question in those cases was whether the defendant had "set the wheels of government in motion by instigating a legal action." ***Wyatt***, 504 U.S. at 164-165; see ***Malley***, 460 U.S. at 340-341.

2. Although the Court's functional analysis is not tort-based, in nearly every case involving grand jury testimony the result will be much the same as it would have been under common law. In most malicious-prosecution actions, a plaintiff will be able to point to some act aside from courtroom testimony that allegedly "procured" the arrest warrant. And a non-testimonial act that induces a prosecutor to "set the wheels of government in motion," ***Wyatt***, 504 U.S. at 164, is not entitled to absolute immunity.

Thus, the outcome would be the same under the functional analysis as it was in common-law cases such as ***Fitzjohn*** and ***Dennis***, which "permitt[ed] a plaintiff to recover in an action for malicious prosecution based *in part* upon the defendant's appearance before the grand jury." ***White*** v. ***Frank***, 855 F.2d 956, 960 (2d Cir. 1988) (emphasis added). In both of those cases, the defendant in the malicious-prosecution action did much more than merely testify in a judicial proceeding. In ***Fitzjohn***, the defendant in the malicious-prosecution suit had falsified a document, charged the plaintiff with perjury, and been assigned to prosecute the case. 142 Eng. Rep. at 199-200. The court specifically rejected the suggestion that the effect of its decision was to make a malicious-prosecution action "maintainable in respect of the evidence given by the defendant before the grand jury," explaining that the action was instead based on non-testimonial acts of procurement: "A prosecutor might give no evidence at all, and every witness called speak the whole truth, and nothing but the truth, and yet the prosecution be malicious." *Id.* at 206 (opinion of Bramwell, B.); accord *id.* at 210 (opinion of Cockburn, C.J.) ("[T]his is neither in form nor substance an action in respect of the perjury committed by the defendant."). Likewise, in *Dennis*, the defendant had gone to the prosecutor and alleged that the plaintiff had altered a financial instrument. 65 N.Y. at 387 (emphasizing that the defendant "appeared before [the district attorney] and related his made-up and malicious story"). Thus, non-testimonial acts were a basis for liability in both cases, and absolute immunity would not have applied.

Petitioner asserts (Br. 15) that common-law "[c]ourts also entertained malicious prosecution suits against those who provided oral testimony to grand juries." But none of the cases he cites involved a claim based only on such testimony. In *Casperson* v. *Sproule*, 39 Mo. 39, 41-42 (1866), for example, the defendant "had falsely, maliciously, and without any reasonable and probable cause, charged plaintiff with the crime of embezzlement, and caused him to be arrested and taken before the recorder of St. Louis" long before he ever appeared in the grand jury. Similarly, in *Stewart* v. *Thompson*, 51 Pa. 158, 160 (1865), the defendant had presented the mayor of Pittsburgh with an information requesting "that a warrant may issue, and that the aforesaid defendants * * * may be arrested and held to answer this charge of misdemeanor" before he brought the case to, and testified before, a grand jury. And in *Kidder*, the defendants had done more than testify: they had drawn up a criminal complaint alleging perjury, signed it, and presented it to other individuals who then joined in their allegations. 85 Mass. at 393. Those non-testimonial acts would have constituted initiation or procurement of a prosecution. Finally, petitioner cites (Br. 15) *Robertson* v. *Spring*, 16 La. Ann. 252 (1861), but in that case the court reversed a malicious-prosecution verdict on the ground that the defendant had not taken "any active part to bring about" the prosecution, *id.* at 252.

3. Under the functional analysis, a grand jury witness would be absolutely immune from malicious-prosecution liability only if his judicial testimony were the sole act alleged to have wrongfully "procured" an indictment. It is not clear that the common law would have permitted liability in those circumstances either. See, *e.g.*, *Perkins* v. *Mitchell*, 31 Barb. 461, 468 (N.Y. Gen. Term 1860) ("It is unquestionable that a person who institutes a groundless proceeding * * * is liable to an action for the injury he occasions," but "the action must be for the malicious complaint, indictment or action, *and not for the words*" (emphasis added)). But even if the common law did permit plaintiffs to proceed against witnesses for their words alone, a rule that distinguishes between testimony in the course of ongoing judicial proceedings and other, non-testimonial acts would represent only a modest divergence from the common-law rule—a divergence required by this Court's functional approach to witness immunity and by the paramount interest in protecting the grand jury process.

E. This Court Should Remand The Case So That The Lower Courts May Consider Whether Petitioner Has Stated A Malicious-Prosecution Claim Based On Conduct Other Than Paulk's Grand Jury Testimony

1. Under a proper application of this Court's immunity analysis, Paulk has qualified, rather than absolute, immunity for procuring or inducing a malicious prosecution, so long as the alleged means of procurement or inducement were acts other than grand jury testimony. Because the courts below did not analyze the issue in these terms, their opinions leave room for doubt as to whether petitioner has stated a claim based on non-testimonial acts.

The opinion of the court of appeals could be read to suggest that petitioner's malicious-prosecution claim is based entirely on Paulk's testimony before the grand jury. See, *e.g.*, Pet. App. 17a ("[T]he only evidence [petitioner] alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity."). Petitioner, however, contended otherwise in his appellate brief. See Pet. C.A. Br. 18-23; *id.* at 18 ("Even if Paulk is entitled to absolute immunity with regard to his grand jury testimony, * * * [e]very count asserted against Paulk is based on more misconduct than simply his fraudulent grand jury testimony."). Portions of petitioner's complaint suggest that petitioner alleged other, non-testimonial acts that might provide a basis for liability. See, *e.g.*, J.A. 28 (alleging that Paulk "actively instigated or encouraged the prosecution" of petitioner); J.A. 29 (alleging that Hodges and Paulk "set a series of acts in motion which they knew or reasonably should have known would cause violations of [petitioner's] constitutional rights"); see also Pet. App. 31a, 33a (holding that "very detailed" allegations supporting petitioner's retaliatory investigation claim sufficiently alleged that a "'non-prosecuting official' * * * successfully induced the prosecutor to bring charges that would not otherwise have been brought").

There is no need for this Court to decide at this time whether the allegations in the complaint are sufficient for liability. Instead, the Court should remand to permit the court of appeals to address that issue in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009).

2. Although petitioner's suit raises questions about whether a malicious-prosecution suit may be maintained under Section 1983 at all, as well as questions about what the elements of that cause of action would be, the Court should not address those issues in this case.

This Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983," including the antecedent question whether "such a claim is cognizable" at all. *Wallace* v. *Kato*, 549 U.S. 384, 390 n.2 (2007). In *Albright* v. *Oliver*, 510 U.S. 266 (1994), the Court rejected the proposition that there is a substantive due process right "to be free from criminal prosecution except upon probable cause." *Id.* at 268 (plurality opinion). The courts of appeals have since divided over whether malicious-prosecution claims are nevertheless actionable under Section 1983 as Fourth Amendment claims. See, *e.g.*, *Lambert* v. *Williams*, 223 F.3d 257, 261 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001). In particular, some courts have "indicated that the common law elements of malicious prosecution may establish a Fourth Amendment violation with respect to defendants acting under color of state law." *Ibid.* Others have held that "[c]ommon law malicious prosecution is not itself redressable under § 1983," *id.* at 260, and that such claims are "properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort," *id.* at 261. Those courts include the court below, which requires a plaintiff to "prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of the common law tort of malicious prosecution." *Wood* v. *Kesler*, 323 F.3d 872, 881 (11th Cir.) (emphasis omitted), cert. denied, 540 U.S. 879 (2003).

Whether the Eleventh Circuit has adopted the correct approach is a matter that was not raised below, was not addressed in the parties' briefing at the petition stage, and was not discussed in petitioner's opening brief. This Court should continue to reserve judgment on the issue until it has been squarely presented and fully briefed.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the position set forth in this brief.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

TONY WEST
Assistant Attorney General

NEAL KUMAR KATYAL
Deputy Solicitor General

ERIC D. MILLER
Assistant to the Solicitor General

BARBARA L. HERWIG
MICHAEL P. ABATE
Attorneys

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AMICUS CURIAE BRIEF

SEP 16 2011

No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG,
Petitioner,
v.
JAMES P. PAULK, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

LAWRENCE ROSENTHAL
Counsel of Record
Chapman University School of Law
One University Drive
Orange, CA 92866
(714) 628-2650
rosentha@chapman.edu

Counsel for Amici Curiae

September 16, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a law enforcement official sued for an allegedly unreasonable search and seizure resulting from testimony before a grand jury that allegedly failed to supply probable cause to arrest should be denied testimonial immunity on the theory that the official is properly analogized to a complaining witness who could be sued at common law for the tort of malicious prosecution.

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INTEREST OF THE AMICI CURIAE

Amici are organizations that represent the interests of local governments throughout the United States.[1] The International Municipal Lawyers Association is a nonprofit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. The National League of Cities represents more than 19,000 cities, villages, and towns across the country. The National Association of Counties represents county governments throughout the United States, providing essential services to the nation's 3,068 counties.

Because local governments are frequently responsible for representing their employees when sued for actions undertaken within the scope of their employment, and often indemnify law enforcement officials employed by local law enforcement agencies for their legal costs, they bear the financial burden of defending law enforcement officials who are sued for activities undertaken within the scope of their employment. Moreover, because the threat of liability can inhibit law enforcement officials from the vigorous performance of their duties, it compromises the efforts of local governments to serve and protect their residents.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

From September 2003 through March 2004, petitioner Charles A. Rehberg sent a series of anonymous faxes to the management of Phoebe Putney Memorial Hospital, criticizing the management of the hospital. J.A. 11.[2] At the time, Kenneth B. Hodges was the District Attorney of Dougherty County, Georgia, and respondent James P. Paulk was the Chief Investigator for the District Attorney's office. J.A. 2-3. District Attorney Hodges and Chief Investigator Paulk subsequently initiated an investigation of petitioner as a "favor" to the hospital. J.A. 11-12. From October 2003 to February 2004, District Attorney Hodges and Chief Investigator Paulk prepared and issued a number of grand jury subpoenas on the District Attorney's letterhead for petitioner's telephone records and emails sent and received from one of petitioner's email accounts, even though no relevant information had yet been presented to the grand jury. J.A. 12-14. Chief Investigator Paulk provided the subpoenaed records to private investigators who provided payment for the records, in most cases directly to the subpoenaed parties, reimbursing them for the expense of production. J.A. 12-13, 14, 15-16.

After press coverage of his relationship with the hospital, District Attorney Hodges recused himself from the investigation, and Kelly R. Burke was named special prosecutor for the matter, although allegedly

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[2] Because this case is before the Court on petitioner's complaint, we take all nonconclusory allegations in the complaint as true. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

District Attorney Hodges continued his involvement in the investigation. J.A. 17-18.

On December 14, 2005, a grand jury returned an indictment charging petitioner with aggravated assault, burglary, and five counts of "harassing phone calls," alleging that petitioner had assaulted and unlawfully entered the home of Dr. James Hotz and had made harassing phone calls to Dr. Hotz. J.A. 4-5. Chief Investigator Paulk was the only witness who testified before the grand jury, and was listed as the "complainant" in the indictment. J.A. 6. After petitioner contested the sufficiency of the indictment, Special District Attorney Burke agreed to dismiss the indictment. J.A. 7-8.

On February 15, 2006, a second grand jury, after hearing testimony from Chief Investigator Paulk and Dr. Hotz, returned an indictment charging petitioner with assault and five counts of harassing phone calls. J.A. 8. Petitioner contested the sufficiency of this indictment as well, and Special District Attorney Burke agreed to dismiss it at a hearing on April 10, 2006, and on July 7, the state trial court ordered the indictment dismissed. J.A. 9-10.

On March 1, 2006, Special District Attorney Burke and Chief Investigator Paulk appeared before a third grand jury and obtained an indictment charging petitioner with assault and harassing telephone calls. J.A. 9. On May 1, the state trial court dismissed these charges on the ground that they did not sufficiently allege an offense. J.A. 9-10.

At some point unspecified in the complaint, petitioner was arrested, fingerprinted, and photographed pursuant to a warrant issued as a result of the second and third indictments. J.A. 26-27.[3]

After the criminal charges had been resolved, petitioner filed an action in federal court seeking damages from District Attorney Hodges, Special District Attorney Burke, Chief Investigator Paulk, and Dougherty County, Georgia, alleging a deprivation of his rights under federal law actionable under 42 U.S.C. § 1983 (2006), and advancing a number of state-law claims as well. Pet. App. 82a. The complaint alleged that District Attorney Hodges and Chief Investigator Paulk instituted an investigation and obtained indictments with malice and without probable cause, that petitioner was arrested, fingerprinted and photographed, and that the warrant for his arrest was based on Chief Investigator's Paulk's testimony that was made with reckless disregard for the truth, rendering the arrest warrant that issued pursuant to the indictment invalid under the Fourth Amendment to the United States Constitution. J.A. 7, 26-27. The complaint additionally alleged that District Attorney Hodges and Chief Investigator Paulk initiated the investigation and prosecution of petitioner in retaliation for petitioner's exercise of his right to free speech under the First Amendment, J.A. 31, and that they conspired with each other and with Special District Attorney Burke to violate petitioner's rights under the First, Fourth, and Fourteenth Amendments, J.A. 37.

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[3] Chief Investigator Paulk has admitted that he never interviewed any witnesses or gathered any evidence indicating that petitioner had committed aggravated assault or burglary, and had never interviewed the recipients of the allegedly harassing faxes, adding that it is common for he and other investigators to testify "without adequate knowledge or preparation or personal knowledge of the facts being attested to as true." J.A. 6-7.

The district court denied the individual defendants' motion to dismiss the complaint, while granting Dougherty County's motion to dismiss the action against it. Pet. App. at 104-08. The individual defendants took an appeal from the ruling of the district court to the extent that it denied their immunity defenses on the section 1983 claims, and the court of appeals affirmed in part and reversed in part. Pet. App. 7a-8a & n.5, 44a. On petitioner's allegations of a malicious prosecution in violation of the Fourth and Fourteenth Amendments to the Constitution, the court held that Chief Investigator Paulk was entitled to immunity from liability for his testimony before the grand jury. *Id.* at 12a-14a. The court concluded that testimonial immunity applied as well to the claim that District Attorney Hodges and Chief Investigator Paulk conspired to bring unwarranted charges against petitioner. *Id.* at 15a-18a. The court granted District Attorney Hodges absolute prosecutorial immunity on petitioner's claim of retaliatory prosecution in violation of the First Amendment, *id.* at 33a-34a, and granted Chief Investigator Paulk qualified immunity on that claim because of the unsettled state of the law on this theory of liability. *Id.* at 34a-36a, 42a-44a.[4] The court also granted Special District Attorney Burke prosecutorial immunity on claims of fabricating evidence, presenting Chief Investigator Paulk's testimony to the grand jury, and making defamatory statements about petitioner to the media. *Id.* at 42a.

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[4] On petitioner's claim arising from the issuance of subpoenas, the court held that the use of subpoenas to obtain telephone records did not violate petitioner's constitutional rights, Pet. App. 18a-20a, and petitioner's claims based on the acquisition of his email records was barred by qualified immunity. *Id.* at 20a-28a.

SUMMARY OF THE ARGUMENT

Petitioner seeks damages for an allegedly unwarranted prosecution. Petitioner's claim is necessarily premised on Chief Investigator Paulk's testimony before a grand jury that, the complaint alleged, failed to supply probable cause to support his arrest as required by the Constitution. Witnesses, however, are entitled to immunity from civil liability so that they may testify free from the potentially chilling effects of civil litigation arising from their testimony. Under this rule, the judgment of the court of appeals should be affirmed.

Petitioner argues that Chief Investigator Paulk should be denied testimonial immunity, relying on the common-law rule recognizing the liability of a "complaining witness" for the tort of malicious prosecution. The common-law tort of malicious prosecution, however, is quite different from petitioner's claim, making application of the common-law liability rules for malicious prosecution fundamentally misconceived.

At the outset, it deeply misunderstands the contemporary criminal process to suggest that a law enforcement official with investigative responsibilities is akin to a complaining witness. Absent some a claim that the investigator somehow misled the prosecutor, the decision to prosecute is properly attributed to the prosecutor, not an investigator. Moreover, petitioner's false-arrest claim, based as it is on the Fourth Amendment's prohibition on unreasonable search and seizure, has a fundamentally different character than the common-law tort of malicious prosecution; at common law, proof sufficient to support a Fourth Amendment claim would not have been sufficient to deny a witness testimonial immunity.

The policies that underlie the rule of testimonial immunity are fully applicable here. Testimonial immunity was developed to shield witnesses from the burdens of litigation arising from their testimony. These policies amply justify immunity for investigative officials sued for their grand jury testimony. Imposing liability on investigators for allegedly wrongful prosecutions is particularly anomalous because the decision to prosecute is made by prosecutors, not investigators, yet the former, on petitioner's view, retain absolute immunity. The remedy for a prosecution based on inaccurate testimony is a speedy, public, and fair trial, not suing the witnesses.

ARGUMENT

In this Court, petitioner contests only the court of appeals' ruling on testimonial immunity. *See* Pet. i. The only claim against Chief Investigator Paulk that the court of appeals concluded was barred by testimonial immunity was what petitioner labels his "section 1983 malicious prosecution claim." Pet. Br. 8 (citation and footnote omitted).[5]

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[5] As petitioner acknowledges, his claims against the prosecutors and his conspiracy and retaliatory prosecution claims are not before this Court. *See* Pet. Br. 3-4 n.2, 8 n.5. Moreover, the court of appeals rejected petitioner's claim for the allegedly wrongful use of grand jury subpoenas on grounds other than testimonial immunity. Pet. App. 18a-28a.

Section 1983 makes actionable "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983 (2006). Accordingly, "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Baker v. McCollan*, 443 U.S. 137, 140 (1979). It follows that an allegedly "malicious prosecution" is actionable only if it involves a deprivation of a right protected by section 1983.

The "malicious prosecution" count of petitioner's complaint invoked petitioner's rights under the Fourth Amendment's prohibition on unreasonable search and seizure and the Fourteenth Amendment's Due Process Clause. J.A. 25-27. A majority of this Court has concluded, however, that no claim is available under the Fourteenth Amendment's Due Process Clause based on a deprivation of liberty associated with the initiation of the criminal process because of the availability of Fourth Amendment claim for an allegedly unreasonable search and seizure. *See Albright v. Oliver*, 510 U.S. 266, 271-74 (1994) (plurality opinion); *id.* at 288-91 (Souter, J., concurring in the judgment).[6] A Fourth Amendment claim, in contrast, is available to petitioner. Even a facially valid warrant is subject to attack under the Fourth Amendment if it was issued on the basis of intentional or recklessly false statements material to the existence of probable cause to arrest. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). Petitioner's complaint attacks the warrant authorizing his arrest on just this basis. J.A. 7, 26-27.[7] Nevertheless, testimonial immunity defeats petitioner's Fourth Amendment claim.

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[6] Two additional Justices concluded that no due process claim is available when state law provides a tort remedy for malicious prosecution. *See* 510 U.S. at 283-86 (Kennedy, J., jointed by Thomas, J., concurring in the judgment). Here, Georgia law offers petitioner a tort remedy for an allegedly malicious prosecution. *See, e.g., Bateast v. DeKalb County*, 258 Ga. App. 131, 572 S.E.2d 756 (2002).

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that a police officer sued for allegedly false testimony that produced a criminal conviction enjoyed absolute immunity from damages liability under section 1983. *See id.* at 326, 345-46. The Court reasoned that when Congress enacted section 1983 as part of the Civil Rights Act of 1871, "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain . . . ." *Id.* at 330 (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). At the time, testimonial immunity was well established. *See id.* at 330-31. Finding no indication in the language or legislative history of section 1983 of an intent to repudiate the common-law immunity for testimony, the Court recognized testimonial immunity in actions under section 1983. *See id.* at 336-46.

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[7] As petitioner notes, "[t]he Eleventh Circuit recognizes a valid § 1983 claim for malicious prosecutions in violation of the Fourth Amendment." Pet. Br. 6 n.3. Petitioner presumably presses only a Fourth Amendment claim because any other, even if ultimately deemed meritorious, would not describe a violation of clearly established law necessary to overcome a qualified immunity defense. *See, e.g.*, *Wilson v. Layne*, 526 U.S. 603, 614-18 (1999).

Although the Solicitor General speculates that petitioner's claim can somehow be based on Chief Investigator Paulk's alleged misconduct prior to his grand jury testimony that played some role in producing the ensuing prosecution (U.S. Br. 29-30), if immunity could be defeated merely by pointing to a nonimmunized act that preceded an otherwise immunized tort, immunity could always be circumvented. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation . . . ."); *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976) ("A claim of using perjured testimony simply may be reframed and asserted as a claim for suppression of the evidence upon which the knowledge of perjury rested . . . . Denying absolute immunity from suppression claims could thus eviscerate . . . the absolute immunity from claims of using perjured testimony."). Instead, immunity is available when an essential element of a plaintiff's claim can only be established through proof of an immunized act. *See, e.g., Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009) (claims against supervisory prosecutors for failure to adopt adequate policies for disclosure of exculpatory evidence defeated by prosecutorial immunity because "an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim").

Here, petitioner's claim is inextricable from Chief Investigator Paulk's testimony. The Solicitor General agrees that petitioner's claim is necessarily premised on the Fourth Amendment (U.S. Br. 30-31), and as we explain above, petitioner can establish a Fourth Amendment violation only if the indictment that produced his arrest was unsupported by probable cause and based intentionally or recklessly false statements. Accordingly, petitioner's claim cannot be sustained without consideration of the substance of Chief Investigator Paulk's grand jury testimony to determine whether it supplied probable cause. It follows that an essential element of petitioner's claim rests on immunized testimony.[8]

In his opening brief, petitioner does not argue that Chief Investigator Paulk's testimony is unnecessary to his section 1983 claim. Instead, he argues that testimonial immunity is inapplicable to "a complaining witness whose grand jury testimony trigger[ed] the issuance of an indictment . . . ." Pet. Br. 9. In the discussion that follows, we explain that the common-law liability of a complaining witness does not embrace the claim that petitioner presses.

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[8] Although the complaint alleged that Chief Investigator Paulk did not gather any evidence or interview witnesses prior to his grand jury testimony, grand jury testimony relating the results of an investigation by others raises no constitutional concern. It has long been settled that an indictment may be based on hearsay testimony. *See, e.g., Costello v. United States*, 350 U.S. 359, 362-64 (1956).

I. THE COMPLAINING WITNESS DOCTRINE PROVIDES NO BASIS TO DENY IMMUNITY TO A LAW ENFORCEMENT OFFICER'S GRAND JURY TESTIMONY.

Petitioner likens Chief Investigator Paulk to a "complaining witness," who at common law could be held liable for the tort of malicious prosecution. *See* Pet. Br. 11-12. Petitioner's effort to equate a law enforcement official testifying about the results of an investigation to a complaining witness, who could be held liable at common law for an allegedly malicious prosecution, is deeply flawed.

A. At Common Law, Testimonial Immunity Was Limited Only By The Tort of Malicious Prosecution.

The settled rule at the time of section 1983's enactment was that statements of witnesses in judicial proceedings enjoyed absolute immunity from defamation liability. *See, e.g.*, Joel Prentiss Bishop, Commentaries on the Non-Contract Law § 298 (1889); Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 211-13 (1880) (Fred B. Rothman & Co. 1993); 1 Francis Hilliard, The Law of Torts 319-22 (3d ed. rev. 1866); John Townshend, A Treatise on the Wrong Called Slander and Libel § 220 (3d ed. 1877); Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 476-77 (1909). This rule was fully applicable grand jury testimony. *See, e.g.*, *Kidder v. Parkhurst,* 393 Mass. 393, 396 (1862); *Sands v. Robison*, 20 Miss. (12 S&M) 704, 712 (1849); *Schultz v. Strauss,* 127 Wis. 325, 328, 106 N.W. 1066, 1067 (1906); *Lake v. King,* 1 Wms. Saund. 131, 132, 85 Eng. Rep. 137, 139 (K.B. 1679); *Rex v. Skinner*, 1 Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772); Hilliard, *supra* at 320. It was this common-law rule on which the Court relied when adopting the doctrine of testimonial immunity in *Briscoe*. *See* 460 U.S. at 330-32.

One responsible for instituting a criminal prosecution, in contrast, could be liable for the tort of malicious prosecution. *See* Cooley, *supra* at 180-81; Hilliard, *supra* at 413-14; Martin L. Newell, A Treatise on the Law of Malicious Prosecution, False Imprisonment, and Abuse of Legal Process 6-7 (1892); Townshend, *supra* § 220.

Thus, at common law, "an ordinary witness could not be sued at all; a complaining witness (*i.e.*, the private party bringing the suit) could be sued for malicious prosecution but not for defamation." *Burns v. Reed*, 500 U.S. 478, 501 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). It follows that the critical question here is whether a section 1983 claim against a law enforcement official based on his grand jury testimony preceding an indictment bears sufficient resemblance to a common-law action for malicious prosecution to deny a witness the immunity that would otherwise recognized for defamatory statements made in the course of judicial proceedings.

Briscoe suggests a negative answer to that question; in that case, it was the dissenters who argued that a police officer who provides allegedly perjurious testimony in support of a prosecution should be likened to one who faced liability for malicious prosecution at common law. *See* 460 U.S. at 350-52 (Marshall, J., dissenting).[9] Petitioner nevertheless claims that this Court has already twice answered this question in his favor, in ***Malley** v.* ***Briggs***, 475 U.S. 335 (1986), and ***Kalina** v.* ***Fletcher***, 522 U.S. 118 (1997). *See* Pet. Br. 18-21. Neither case, however, involved a claim of testimonial immunity.

In ***Malley***, a state trooper argued that "he should be absolutely immune because his function in seeking an arrest warrant was similar to that of a complaining witness." 475 U.S. at 340. Thus, rather than denying that the section 1983 action fell within the scope of the common-law rule governing the liability of complaining witnesses, the trooper embraced the label of complaining witness. The trooper relied not on the doctrine of testimonial immunity, but rather contended that "th[e] function of applying to a magistrate for an arrest warrant was accorded immunity from tort actions at common law if the only allegation of misconduct was that the application was legally insufficient." Brief for Petitioners 19, ***Malley** v.* ***Briggs*** (No. 84-1586). In that context, the Court wrote: "In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously, and without probable cause." *Malley*, 475 U.S. at 340-41 (footnote omitted). The Court therefore rejected the claim that those who sought arrest warrants had blanket immunity from civil liability at common law, but did not discuss the applicability of testimonial immunity, on which the trooper had not relied.[10]

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[9] Although the Court noted that only immunity for testimony at trial was before it, *see* 460 U.S. at 328 n.5, had the Court accepted the dissenters' argument – now embraced by petitioner – that the officer lacked immunity because he would have been liable for malicious prosecution at common law, it would follow that even the officer's trial testimony would lack immunity because the common law recognized no immunity for malicious prosecution, as the Solicitor General observes. *See* U.S. Br. 21-22.

In *Kalina*, a prosecutor sought absolute prosecutorial immunity for executing a certification in which she swore to the truth of the facts alleged in a criminal complaint, arguing that "the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution." 522 U.S. at 130. The Court disagreed: "Testifying about the facts is the function of the witness, not the lawyer." *Id.* Thus, only a claim of prosecutorial immunity was before the Court; the decision resolved nothing about the scope of testimonial immunity.

Accordingly, the question whether a law enforcement official's testimony before a grand jury that results in an indictment is sufficiently akin to a common-law action for malicious prosecution to justify a denial of testimonial immunity was addressed by neither *Malley* nor *Kalina*. To the extent that this question was not resolved by *Briscoe*, historical inquiry fails to support petitioner's submission, as we now explain.

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[10] The Court also rejected the trooper's claim that he should receive "the same absolute immunity enjoyed by the prosecutor," finding "no comparable tradition of absolute immunity for one who causes a warrant to issue," and adding that a police officer's role in seeking a warrant "is further removed from the judicial phase of criminal proceedings than the act of prosecutor in seeking an indictment." 475 U.S. at 342, 342-43. It was only in this discussion that the Court, in passing, mentioned *Briscoe*, and then only for its discussion of prosecutorial immunity. *See id.* at 342 (citing *Briscoe*, 460 U.S. at 334-35).

B. Petitioner's Claim Does Not Fall Within The Common-Law Scope of Malicious Prosecution.

The Restatement of Torts describes the tort of malicious prosecution:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if:
>
> (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
>
> (b) the proceedings have terminated in favor of the accused.

Restatement (Second) of Torts § 653 (1977). The elements of this tort have changed little since the Civil Rights Act of 1871; in that era as well, malicious prosecution required proof that the defendant instituted a prosecution maliciously and without probable cause, which was terminated favorably to the accused. *See, e.g.*, Bishop, *supra* §§ 221-26; Cooley, *supra* at 180-81; Hilliard, *supra* at 416-18, 428-58; Newell, *supra* at 10-13; Townshend, *supra* §§ 420-21.

For fundamental reasons, petitioner's claim critically differs from the common-law tort of malicious prosecution. For that reason, the liability of a complaining witness for an allegedly malicious prosecution has no proper application to petitioner's claim.

1. A Public Official with Investigative Responsibilities Is not Akin to a Complaining Witness.

Liability for an allegedly malicious prosecution is appropriate only on one who "initiates or procures" the prosecution. Restatement (Second) of Torts § 653 (1977). Thus, liability for a malicious prosecution requires proof that the alleged complaining witness was responsible for bringing the prosecution. As this Court explained not long before the enactment of the Civil Rights Act of 1871: "To support an action for a malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement . . . ." *Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 550 (1860).

When the common-law tort of malicious prosecution developed, nothing resembling modern police departments with investigative responsibilities existed. In England, until roughly the time of the American Revolution, the only public official engaged in law enforcement was the constable, an official charged with executing warrants and who appointed beadles responsible for clearing the streets of beggars and vagrants by day and keeping the community safe at night. *See* Elaine A. Reynolds, Before the Bobbies: The Night Watch and Police Reform in Metropolitan

London, 1720-1830, at 7-44 (1998). This system emerged in the colonies and remained in place in the framing era, with the duties of public officials engaged in law enforcement largely confined to the execution of warrants and responding to breaches of the peace. *See, e.g.*, Lawrence M. Friedman, Crime and Punishment in American History 28-29, 68 (1993). Not until the mid-nineteenth century did large cities begin establishing police forces. *See, e.g.*, David R. Johnson, Policing the Urban Underworld: The Impact of Crime on the Development of the American Police, 1800-1887, at 12-40 (1979); Thomas A. Repetto, The Blue Parade 2-23 (1978); James F. Richardson, Urban Police in the United States 6-15, 19-32 (1974); Samuel Walker, Popular Justice: A History of American Criminal Justice 49-51 (1980). Even so, by the time of the Civil Rights Act, policing was still in its infancy: "If we can believe the census figures, there were, all told, in 1880, 1,752 officers and 11,948 patrolmen in cities and towns with inhabitants of 5,000 or more." Friedman, *supra* at 149.

Public prosecutors were also a rarity in this period. Prosecution by private parties was the predominant method at common law and was only gradually displaced by public prosecution during the nineteenth century. *See* Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, *in* 3 Encyclopedia of Crime and Justice 1286 (Sanford H. Kadish et al. eds., 1983). Nevertheless, "because of deficiencies in the office of public prosecutor, privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Leg. Hist. 43, 43

(1995) (footnote omitted). Indeed, "when § 1983 was enacted . . . there was generally no such thing as the modern public prosecutor." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring).

It should therefore be unsurprising that virtually all of the cases describing the tort of malicious prosecution prior to 1871 considered the liability of private individuals for initiating a prosecution rather than the potential liability of public officials such as prosecutors or investigators. *See, e.g.*, Herbert Stephen, The Law Relating to Actions for Malicious Prosecution 16-25 (Horace M. Rumsey ed. 1889); Townshend, *supra* at 432. Indeed, none of the nineteenth-century cases that petitioner cites was brought against a public official. *See* Pet. Br. 14-16 (and cases cited therein).

Petitioner repeatedly cites *Wyatt v. Cole*, 504 U.S. 158 (1992), without acknowledging its description of the limitation on immunity at common law: "Respondents do not contend that *private* parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution . . . were entitled to absolute immunity." *Id.* at 164 (emphasis supplied). Indeed, *Wyatt* considered only the immunity of private parties, not public employees. *See id.* at 161-62. Similarly, Justice Scalia characterized a complaining witness as "the *private* party bringing the suit," *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis supplied). *See also Kalina*, 522 U.S. at 132 (Scalia, J., concurring) ("A private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution . . . ."). And, as we explain above, the Restatement of Torts provides that malicious prosecution liability attaches to "[a] *private* person who initiates or procures the institution of criminal proceedings." Restatement (Second) of Torts § 653 (1977) (emphasis supplied); it makes no provision for the liability of a public official.

The common-law concept of a complaining witness legally responsible for the institution of a prosecution made sense in a system of private prosecution, but has little application to the liability of a public official who testifies to support a charge pressed by a public prosecutor in the contemporary system of public prosecution. In the contemporary criminal justice system, the decision to prosecute is made by the prosecutor, not a complaining witness. That is the case under Georgia law, where it is the responsibility of the district attorney to draw indictments and prosecute indictable offenses. *See* Ga. Code § 15-8-6(4) (2007). It is even more anomalous to treat a subordinate investigator such as Chief Inspector Paulk as legally responsible for the decision to prosecute. Chief Investigator Paulk worked for the District Attorney, not the other way around. *See id.* § 15-18-14.1. Even petitioner's complaint acknowledged this reality; it alleged that the prosecutor "directed Mr. Paulk to appear before the Grand Jury and to attest to the truth of [the] charges." J.A. 28.

It may be that the prosecutors were negligent or worse in pressing charges against petitioner, but under a ruling below that petitioner does not contest, the prosecutors are immune from liability. It seriously distorts reality, moreover, to regard an investigator as responsible for bringing an allegedly malicious prosecution. As Justice Ginsburg has put it, in a suit against an investigator, "a 'malicious prosecution' theory . . . is anomalous. The principal player in carrying out a prosecution . . . is not police officer but prosecutor." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). *See generally* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 65 Chi.-Kent L. Rev. 127, 142-52 (2010) (criticizing efforts to circumvent prosecutorial immunity by attributing allegedly wrongful prosecutions investigators).

Under ordinary rules of proximate causation that this Court has held applicable to section 1983 litigation, *see, e.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989), at least seven circuits have held that an investigator cannot be held liable for the course of a criminal prosecution because a prosecutor's independent litigating decision is a break in the chain of causation.[11] This Court has taken the same view; in search or seizure itself." *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)). Thus, the fact that the arrestee was subsequently prosecuted or even convicted as a consequence of an arrest unsupported by probable cause is no bar to a Fourth Amendment claim under section 1983; even those who are convicted following an allegedly unconstitutional arrest are entitled to seek compensation for a wrongful arrest.

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[11] *See, e.g.*, *Shields v. Twiss*, 389 F.3d 142, 150 (5th Cir. 2004) (decision to indict defeated Fourth Amendment malicious prosecution claim); *Evergary v. Young*, 366 F.3d 238, 246–51 (3d Cir. 2004) (judge's decision to authorize seizure of plaintiff's son defeated claim against attorney and officials who obtained order); *Townes v. City of New York*, 176 F.3d 138, 146–47 (2d Cir. 1999) (judge's ruling to admit evidence obtained in violation of the Fourth Amendment defeated claim against officer); *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999) (grand jury's indictment defeated claim against officer based on illegal arrest); *Taylor v. Meacham*, 82 F.3d 1556, 1563–64 (10th Cir. 1996) (judge's finding of probable cause defeated Fourth Amendment claim against arresting officer); *Reed v. City of Chicago*, 77 F.3d 1049, 1053–54 (7th Cir. 1996) (indictment defeated Fourth Amendment claim against arresting officer); *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988) (decision of federal agents, prosecutor, and grand jury to proceed on prosecution unsupported by probable cause defeated claim against officer); *Dellums v. Powell*, 566 F.2d 167, 192–93 (D.C. Cir. 1977) (decision by

Indeed, in *Heck*, the Court explained that "a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction." 512 U.S. at 487 n.7. An example is *Haring v. Prosise*, 462 U.S. 306 (1983); this Court held that a prisoner's action to recover for illegal search and seizure was not barred by his plea of guilty to possessing items found in the search because the conviction was "simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983." *Id.* at 316. Similarly, in *Wallace v. Kato*, 549 U.S. 384 (2007), this Court concluded that a Fourth Amendment false-arrest claim accrues as soon as an arrestee appears before a judicial officer, even if he faces criminal charges arising from the arrest. *See id.* at 391, 397. Accordingly, a Fourth Amendment claim fundamentally differs from a malicious prosecution claim, which requires proof of a favorable outcome in an antecedent prosecution.

Second, any analogy between a Fourth Amendment false-arrest claim and malicious prosecution is flawed because the Fourth Amendment addresses "unreasonable searches and seizures," U.S. Const. amend. IV, not unwarranted prosecutions.

As we explain above, the legal wrong addressed by the Fourth Amendment is fully accomplished by the unreasonable search or seizure itself – in this case, an arrest allegedly without probable cause. Even the "use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *Leon*, 468 U.S. at 906 (quoting *Calandra*, 414 U.S. at 354 (brackets in original)). Accordingly, the Fourth Amendment simply does not address the decision to prosecute; indeed, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court rejected the view that the Fourth Amendment entitles "the accused . . . to judicial oversight or review of the decision to prosecute." *Id.* at 119. *See also Albright*, 510 U.S. at 282 (Kennedy, J., concurring in the judgment) ("The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, nor require a pretrial hearing to weigh evidence according to a given standard.") (citations omitted). As Judge Posner put it, "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003), *overruled in part on other grounds by Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006), *aff'd sub nom. Wallace v. Kato*, 549 U.S. 384 (2007).[13] Thus, a claim for malicious prosecution stands outside the Fourth Amendment.

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[13] On this basis, five circuits have concluded that no damages associated with a criminal prosecution are recoverable on a Fourth Amendment claim. *See Gauger*, 349 F.3d at 362-63; *Hector v. Watt*, 235 F.3d 154, 157-60 (3d Cir. 2000); *Townes*, 176 F.3d at 147-48; *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181-82 (4th Cir. 1996); *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 4 (1st

Third, although the common-law tort of malicious prosecution required proof of malice, a Fourth Amendment claim does not. As we explain above, in addition to the absence of probable cause, a malicious prosecution claim requires proof of malice, defined in the Restatement of Torts as bringing the case "primarily for a purpose other than that of bringing an offender to justice . . . ." Restatement (Second) of Torts § 653(a) (1977). Leading commentators in the era of section 1983's enactment, while acknowledging that malice may be inferred from an absence of probable cause, nevertheless stressed that malice was an independent element of the tort requiring a separate finding of improper motive. *See*, *e.g.*, Melville M. Bigelow, Leading Cases on the Law of Torts 203-04 (1875); Bishop, *supra* §§ 231-35; Cooley, *supra* at 185; Hilliard, *supra* at 446-48; Newell, *supra* at 236-49.

Fourth Amendment claims, in contrast, are judged by an objective test in which the motive of the investigator is irrelevant. *See*, *e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011); *Brigham City v. Stuart*, 547 U.S. 398, 404-05 (2006). To be sure, as we explain above, to invalidate a warrant, there must be proof of material misstatements or omissions made at least recklessly, but this stops well short of the common-law requirement of malice. Thus, at common law, proof

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Cir. 1995). *See generally* John C. Jeffries, *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1472-77 (1989) (arguing that Fourth Amendment claims should not permit damages associated with prosecution and conviction).

sufficient to establish Chief Investigator Paulk's liability on the Fourth Amendment claim that petitioner presses would constitute no more than the tort of defamation, on which immunity was recognized.

Accordingly, the common-law immunity regime supplies no basis to deny Chief Investigator Paulk testimonial immunity.

II. THE POLICIES THAT JUSTIFY TESTIMONIAL IMMUNITY APPLY WITH FULL FORCE TO A LAW ENFORCEMENT OFFICER'S GRAND JURY TESTIMONY.

Analogies between section 1983 and common-law tort claims are perilous. As this Court has observed, section 1983 "ha[s] no precise counterpart in state law . . . . [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (internal quotations and citation omitted). Thus, the policies underlying immunity law are often more instructive than historical analogies to common-law torts. For example, because prosecutorial immunity developed only after the office of public prosecutor became common only after 1871, in incorporating prosecutorial immunity within section 1983, the Court "drew guidance both from the first American cases addressing the availability of malicious prosecution actions against public prosecutors, and perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors." *Kalina*, 522 U.S. at 124 n.11. Thus, we turn to the pertinent policy considerations.

A. Grand Jury Witnesses Should Receive Testimonial Immunity.

In *Briscoe*, the Court identified the policy considerations supporting the common-law rule of testimonial immunity, explaining that if they were under a threat of damages liability, "witnesses might be reluctant to come forward and testify." *Id.* at 333. Or, "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony . . . ." *Id.* Moreover, "if the defendant official 'could be made to answer in court each time [a previous criminal defendant] charged him with perjury, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.'" *Id.* at 343-44 (quoting *Imbler*, 424 U.S. at 425). Thus, "[s]ubjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties." *Id.* at 343.

Accordingly, it is not a policy of protecting false testimony, but of avoiding the chilling effect of allegations that may prove meritless but which must be defended nevertheless, that justifies testimonial immunity. As perhaps the classic account explained,

> The rule exists, not because the malicious conduct of such persons ought not to be actionable, but because, if their conduct were actionable, actions would be brought against them in cases in which they had not spoken falsely and maliciously; it is not a desire to prevent actions from being brought in cases

> where they ought to be maintained, but the fear that if the rule were otherwise, numerous actions would be brought against persons who were acting honestly in discharge of a duty.

Veeder, *supra* at 469-70 (footnote omitted).

This rationale is fully applicable to investigators testifying before grand juries. There is a strong policy favoring the ability of the grand jury to obtain unfettered access to all potentially relevant testimony. *See, e.g.*, *United States v. R Enterprises*, 498 U.S. 292, 297-98 (1991); *United States v. Calandra*, 414 U.S. 338, 342-45 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 686-88 (1972). If public officials had to assume the costs of defending litigation and paying settlements or judgments arising from their grand jury testimony, however, the chilling effect on the vigorous performance of their duties would be quite real.

To be sure, public employers can avoid this problem by offering indemnification; which is common in public employment. *See Board of County Commissioners v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting). By shifting the costs of litigation onto the taxpayers, however, indemnification imposes burdens on innocent third parties – the taxpayers and those dependent on government services. At best, indemnification may create a political incentive on the part of elected officials to induce their employees to avoid liability-inducing conduct, but given the political incentives for vigorous law enforcement, the likelihood of deterrence operating in this fashion is highly uncertain, especially given the limited control that elected officials responsible for budgeting decisions generally have over the separately-elected prosecutors responsible for charging decisions. *See* Rosenthal, *supra* at 152-54.

Thus, the policies underlying testimonial immunity have plain application to grand jury testimony.

B. The Policies Underlying Malicious-Prosecution Liability Have Little Application To The Public Sector.

As this Court observed in *Kalina*, cases "decided after 1871 . . . granted a broader immunity to public prosecutors than had been available in malicious prosecution actions against private persons who brought prosecutions at early common law." 522 U.S. at 124 n.11. When the Court relied on these cases to recognize absolute prosecutorial immunity under section 1983, earlier cases were not regarded as dispositive because they "were decided before the office of public prosecutor in its modern form was common." *Id.* The same problem infects petitioner's effort to impose the common-law liability rules for malicious prosecution onto public officials with investigative responsibilities. As we explain above, the tort of malicious prosecution developed before public prosecutors or police forces with investigative responsibilities became common. In an era of private prosecution, it made sense to impose malicious prosecution liability on private parties who may press charges to advance their own interests. Even today, there may be reason to impose liability on private parties who endeavor to hijack the criminal process for private ends; it therefore may be fair here to characterize Dr. Hotz, for example, as a "complaining witness." The rules governing the liability of private parties, however, should not readily be transported to the public sector.

As this Court has observed, damages liability is less likely to produce deterrence in the public sector because public officials and employers operate within a system of political accountability rather than as profit-maximizers with an economic incentive to make cost-justified investments in liability reduction. *See Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997). Thus, the Court has concluded that the policy arguments for immunity have little application to the private sector. *See id.* at 407-12; *Wyatt*, 504 U.S. at 166-69. In particular, liability imposes special burdens on government because government internalizes the costs of litigation, while the benefits of aggressive law enforcement are externalized to the public at large. *See* Daryl Levinson, ***Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs***, 67 U. Chi. L. Rev. 345, 348-57 (2000).

For his part, petitioner claims that the threat of liability will deter unwarranted prosecutions. *See* Pet. Br. 25. Given the political incentive of those engaged in law enforcement to enforce the law with vigor, however, the need for an additional deterrent through damages liability is questionable. Deterrence is particularly unlikely under the holding that petitioner seeks, which would impose liability only on investigators even though, in reality, the decision to bring charges is made by prosecutors, who enjoy absolute immunity. Under petitioner's theory, "the star player is exonerated, but the supporting actor is not." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

Petitioner also argues that there is no reason to grant immunity for arrests based on an indictment supported by grand jury testimony as opposed to those initiated by filing an information or complaint supported by affidavit. *See* Pet. Br. 23-24. In light of the constitutional requirement that all warrants be "supported by Oath or affirmation," U.S. Const. amend. IV, however, testimonial immunity for an arrest authorized by warrant is available regardless whether the warrant was based on grand jury testimony or affidavit. Indeed, petitioner acknowledges that at common law, witnesses "who testified in person w[ere] treated identically to one who submitted an affidavit." Pet. Br. 15.

To be sure, in *Malley*, the Court stated that qualified immunity usually grants public officials sufficient protection from liability. *See* 475 U.S. at 341. As we explain above, however, no claim of testimonial immunity was made in that case, and historically testimony has been afforded absolute immunity outside the specific context of malicious prosecution. When it comes to liability for testimony, the policies favoring the ability of witnesses to testify without fear of liability powerfully support absolute immunity, as we also explain above.

Conversely, the safeguards enjoyed by an accused are substantial without need of a damages remedy. Although, as petitioner stresses, grand jury proceedings are not adversarial, *see* Pet. Br. 25-26, an indictment begins a process that affords considerable protection against unwarranted charges. In light of safeguards such as judicial review of extended pretrial detention, and the right to a speedy and fair trial at which the prosecution must prove its case beyond reasonable doubt, the Constitution has never been understood to require judicial review of the decision to prosecute. *See, e.g.*, *Albright*, 510 U.S. at 282-83 (Kennedy, J., concurring in the judgment). The efficacy of political accountability should also be apparent; there is, after all, no prosecute-the-innocent lobby. Not only do overreaching law-enforcement officers risk criminal liability for perjury (*e.g.*, Ga. Code. § 16-10-70 (2007)); but such overreaching also generates political pressure that can produce more effective supervision and discipline. It can lead to systemic reform as well; since the wave of DNA exonerations of recent years, there has been a wave of reform legislation, with 46 states and the Federal Government enacting legislation granting accused or convicted individuals access to DNA evidence. *See District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2316-17, 2322 (2009).

Thus, the safeguards accompanying the criminal justice system, coupled with the process of political accountability, are far more likely to deter investigative misconduct than the possibility of a damages remedy against investigators, who play at most a highly subordinate role in prosecutive decisionmaking, and who are likely to be indemnified. Liability for a Fourth Amendment claim based on grand jury testimony poses additional difficulties; as the court of appeals suggested, the need to parse grand jury testimony to determine if an indictment was supported by probable cause has the potential to undermine the secrecy of grand jury proceedings. Pet. App. 14a n.9.

To be sure, imposing liability would provide compensation to the exonerated, but a regime of compensation without an effective measure of deterrence would amount to a system of wrongful conviction insurance, not tort liability. This Court, in turn, "ha[s] repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability, and ha[s] interpreted the statute in light of the background of tort liability . . . ." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (internal quotations and citations omitted) (brackets in original). Imposing liability for reasons of compensation alone creates a system of social insurance, not a tort liability regime within the ambit of section 1983.

There may be sound arguments for providing wrongful prosecution or conviction insurance; indeed, the federal government and twenty-two states have statutes that require that compensation be paid to the exonerated, although many of these statutes contain important limitations on who can make claims and the amount of compensation available that limit their budgetary impact. *See* Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. Rev. 227, 233-35, 250-51 (2008). Yet, the policy decision whether to devote scarce public resources to the wrongfully prosecuted or convicted, instead of allocating them other urgent public responsibilities, is surely one for the legislature, equipped as it is to weigh competing budgetary priorities, not a decision for judges or juries.

For these reasons, the policies underlying testimonial immunity have plain application to the testimony of investigators before a grand jury. The common-law rule of complaining witness liability, in contrast, is based on quite distinct policy considerations have little application here. Under the Constitution, the remedy for an unwarranted prosecution is a speedy, public, and fair trial, not suing the witnesses.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

LAWRENCE ROSENTHAL
Counsel of Record
Chapman University School of Law
One University Drive
Orange, CA 92866
(714) 628-2650
rosentha@chapman.edu

Counsel for Amici Curiae